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DECISIONS
OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL
THE PARLIAMENT HOUSE, OTTAWA, 1907



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DECISIONS
OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL

relating to

THE BRITISH NORTH AMERICA ACT, 1867

and

THE CANADIAN CONSTITUTION
1867-1954

VOLUME II

ARRANGED BY

RICHARD A. OLMSTED, Q.C.,
of the Department of Justice

DEPARTMENT OF JUSTICE
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Deputy Attorney-General of Canada

EDMOND CLOUTIER, C.M.G., O.A., D.S.P.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1954

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ATTORNEY-GENERAL FOR THE
DOMINION OF CANADA..... }

APPELLANT;

J.C.*
1916

AND

ATTORNEY-GENERAL FOR THE
PROVINCE OF ALBERTA AND
OTHERS..... }

RESPONDENTS;

Feb. 24.

1916 1 A.C.
p. 588.

AND

ATTORNEY-GENERAL FOR THE
PROVINCE OF BRITISH
COLUMBIA..... }

INTERVENER.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Legislative Authority of Dominion—Insurance—“Regulation of trade and commerce”—Insurance Act, 1910 (9 & 10 Edw. 7, c. 32, Canada), ss. 4, 70—British North America Act, 1867 (30 & 31 Vict. c. 3), ss. 91, 92.

By s. 4 of the Insurance Act, 1910, enacted by the Parliament of Canada, “In Canada, except as otherwise provided by this Act, no company or underwriters or other person shall solicit or accept any risk, or issue or deliver any receipt or policy of insurance, or grant any annuity on a life or lives, or collect or receive any premium, or inspect any risk, or adjust any loss, or carry on any business of insurance, or prosecute or maintain any suit, action or proceeding or file any claim in insolvency relating to such business, unless it be done by or on behalf of a company or underwriters holding a licence from the Minister.” Sect. 70 provided that any contravention of s. 4 should be punishable for a first offence by fine, and for a second or subsequent offence by imprisonment with hard labour:—

Held, that the above legislation was ultra vires of the Parliament of Canada, since the authority conferred by the British North America Act, 1867, s. 91, head (2.), to legislate as to “the regulation of trade and commerce” does not extend to the regulation by a licensing system of a particular trade in which Canadians would otherwise be free to engage in the provinces, and since it could not be enacted under the general power conferred by s. 91 to legislate for the peace, order, and good government of Canada as it trenching upon the legislative authority conferred on the provinces by s. 92, head (13.), to make laws as to “civil rights in the province.” 1916 1 A.C. p. 589.

The principle illustrated by *Russell v. The Queen* (1882) 7 App. Cas. 829, that subjects which in one aspect come within the authority of the provincial Legislatures may in another aspect fall within the authority of the Dominion Legislature, is well established, but ought to be applied with great caution.

*Present: LORD BUCKMASTER L.C., VISCOUNT HALDANE, LORD PARKER OF WADDINGTON, and LORD SUMNER.

J.C.
1916

ATTORNEY-
GENERAL
FOR
CANADA
v.
ATTORNEY-
GENERAL
FOR
ALBERTA.

Held, further, that it would be competent to the Parliament of Canada, under s. 91, heads (2.) and (25.), by properly framed legislation, to prohibit an insurance company incorporated by a foreign State from carrying on business in Canada if the company did not hold a licence from the Minister, even if the business carried on was confined to a single province.

APPEAL (1), by special leave, from opinions of the Supreme Court of Canada (October 14, 1913).

The Governor-General in Council by an Order under the Supreme Court Act (R. S. Can., 1906, c. 139), s. 60, referred to that Court the two following questions: (1.) Are ss. 4 and 70 of the Insurance Act, 1910, or any or what part or parts of the said sections, *ultra vires* of the Parliament of Canada? (2.) Does s. 4 operate to prohibit an insurance company incorporated by a foreign State from carrying on the business of insurance within Canada if such company does not hold a licence under the said Act and if such business is confined to one province?

The terms of s. 4 of the Insurance Act, 1910, and the effect of s. 70 appear from the head-note.

The questions were argued in November, 1912, before the Supreme Court, consisting of Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff, Anglin, and Brodeur JJ. On October 14, 1913, the learned judges delivered opinions (reported at 48 Can. S.C.R. 260) in the majority of which it was held that the answer to the first question was that the two sections were *ultra vires*, and to the second "Yes, if *intra vires*." The Chief Justice and Davies J. dissented, being of opinion that the questions should be answered respectively "No" and "Yes."

The following counsel appeared:—*Newcombe, K.C.*, and *Barrington-Ward* (for *R. Asquith*, serving with His Majesty's Forces), for the appellant; *Sir R. Finlay, K.C.*, *Nesbitt, K.C.*, *Geoffrion, K.C.*, and *Hon. M. Macnaghten* (for *G. Lawrence*, serving with His Majesty's Forces), for the Attorneys-General for Ontario, Quebec, and New Brunswick; *Lancot, K.C.*, for the Attorney-General for Quebec; *Parlee, K.C.*, for the Attorneys-General for Alberta and Saskatchewan; *Bayly, K.C.*, for the Attorney-General for Ontario; all the above-

(1) The appeal was consolidated with *Attorney-General for Ontario v. Attorney-General for Canada*, reported at p. 598, post. It was, however,

separately argued, and a separate report will, it is thought, be more convenient.

named Attorneys-General being respondents; *Upjohn, K.C.*, *Bennett, K.C.*, and *Gaudet, K.C.*, for the respondents the Insurance Federation; *H. Douglas* (for *Sir H. Greenwood*, serving with His Majesty's Forces), for the intervening Attorney-General for British Columbia.

In the following report of the arguments only those counsel who addressed the Board are named.

J.C.
1916
ATTORNEY-
GENERAL
FOR
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v.
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1915. Dec. 8, 9, 10. *Newcombe, K.C.*, for the appellant. Sect. 4 has to be considered in connection with the whole Insurance Act, 1910; that Act is one regulating the trade of insurance and is within the authority conferred upon the Parliament of Canada by the British North America Act, 1867, s. 91, head (2.), to legislate for the "regulation of trade and commerce." The Canada Temperance Act, held to be valid in *Russell v. The Queen* (1), like the legislation now in question, affected a single trade carried on throughout Canada. In *Attorney-General for Ontario v. Attorney-General for the Dominion* (2), known as the *Prohibition Case*, Lord Watson, in delivering the judgment of the Board, said that the legislation in *Russell v. The Queen* (1) did not come within s. 91, head (2.), because its character was not regulative but prohibitive. It follows that had it been regulative legislation it would have come within that enumeration and that there is power thereunder to regulate a particular trade. Insurance is a trade: *Bristow v. Towers*. (3) It is referred to as a trade in Adam Smith's *Wealth of Nations* (bk. 5, ch. 1, part 3), it is dealt with in England 1916 1 A.C. p. 591. by the Board of Trade, and comes within the recent Proclamations against trading with the enemy. In *Citizens Insurance Co. of Canada v. Parsons* (4) it was assumed that insurance was a trade. Express authority is given to the Dominion as to certain trades, banking for instance. That, however, is to give a wider power as to those trades in relation to s. 92, head (13.), than is conferred by s. 91, head (2.). A provincial Legislature cannot set up a bank to operate wholly within the province. The judgment in *John Deere Plow Co. v. Wharton* (5) shows that in so far as the Insurance Act, 1910, imposes regulations upon companies operating throughout the Dominion, including

(1) 7 App. Cas. 829.

(3) (1794) 6 T. R. 35.

(2) [1896] A. C. 348, 363.

(4) (1881) 7 App. Cas. 96.

(5) [1915] A.C. 330.

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British and foreign companies, it was competent under s. 91, head (2.), and this would cover nearly the whole of the provisions of the Act. So far as foreign companies are concerned the Act was also within the Dominion authority under s. 91, head (25.), which refers to "aliens." In the cases in which the meaning of "trade and commerce" has been discussed, such as *Citizens Insurance Co. of Canada v. Parsons* (1) and *Bank of Toronto v. Lambe* (2), it has been suggested that the words refer to "inter-provincial trade" or "trade in matters of inter-provincial concern." Here we are dealing with trade of that character; insurance is a trade which cannot be localized. If and so far as this legislation comes within any expressly enumerated head of s. 91 it is immaterial whether it affects any of the subjects assigned to the provinces by s. 92: *Prohibition Case*. (3) If, however, the Parliament of Canada had not authority to enact the legislation under s. 91, head (2.), it had authority to do so under the general power conferred upon it by s. 91 to legislate for the peace, order, and good government of Canada. It is not now contended that the Dominion Parliament has authority under that general power to legislate so as to trench upon any of the expressly enumerated heads of s. 92. Those heads, however, are purely local in character and confer merely provincial powers: *Prohibition Case* (3). This legislation was extra-provincial in character and related to matters of Canadian concern; it consequently was entirely outside the scope of s. 92 and fell within the general or residual power conferred by s. 91. Since 1867 both the Dominion and provincial authorities have treated insurance as being a matter within the legislative authority of the Dominion. The Parliament of Canada passed an Act dealing with insurance in 1868 (31 Vict. c. 48), and Dominion legislation upon that subject has been in force ever since. Provisions substantially the same as ss. 4 and 70 occur in the Insurance Act, 1886 (49 Vict. c. 45). After confederation the provincial authorities treated previously existing provincial legislation with regard to insurance as repealed, as the subject was within Dominion legislative powers: see, for example, R. S. Ont., 1877, vol. 2, pp. 2304, 2314.

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(1) (1881) 7 App. Cas. 96.

(2) (1887) 12 App. Cas. 575.

(3) [1896] A.C. 348, 359.

Upjohn, K.C., for the respondents the Insurance Federation, supported the arguments for the appellant.

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Sir R. Finlay, K.C., and *Geoffrion, K.C.*, for the respondents the Attorneys-General of the provinces above named. In order to appreciate the far-reaching character of s. 4 and the licence thereby required it is necessary to examine in detail the provisions of the Act. This examination shows that the Act goes far beyond the regulation of insurance and vitally affects civil rights in the provinces. A head of legislation under s. 91 in such terms as "the regulation of trade and commerce" must be given a meaning which will not virtually swallow up what is given to the provinces by s. 92, head (13.): *City of Montreal v. Montreal Street Railway*. (1) "Trade and commerce" does not cover a particular trade, whether carried on in one province or in each province: *Citizens Insurance Co. of Canada v. Parsons*. (2) In *John Deere Plow Co. v. Wharton* (3) the Board expressly accepted the view in the last-named case that "trade and commerce" must receive a limited interpretation. In all cases in which the Board has considered legislation bringing "trade and commerce" into conflict with "civil rights in the provinces" the former words have been construed so as not to conflict with the latter. [*Attorney-General of Manitoba v. Manitoba Licence Holders Association* (4), *Bank of Toronto v. Lambe* (5), *Hodge v. The Queen* (6), and the report of the Board (7) declaring without giving reasons, that the Liquor Licensing Act, 1883, known as the McCarthy Act, was ultra vires of the Dominion Legislature, were also referred to.] *Russell v. The Queen* (8) is an anomalous case; it is to be regarded as an authority, but no valid argument can be derived from it. The enumeration refers to "trade and commerce," not to "trades and commerce." *Bristow v. Towers* (9) is not a decision that insurance is a trade. Many insurance companies are conducted upon mutual principles and are not traders: *New York Life Insurance Co.*

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(1) [1912] A.C. 333, 343.

(2) 7 App. Cas. 96, 113.

(3) [1915] A.C. 330, 340.

(4) [1902] A.C. 73, 77, 78.

(5) 12 App. Cas. 575, 586.

(6) (1883) 9 App. Cas. 117, 129.

(7) November 11, 1885. Unreported; a print of the shorthand notes of the hearing was referred to.

(8) 7 App. Cas. 829.

(9) 6 T.R. 35.

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v. *Styles* (1). Insurance is not commerce: *Paul v. Virginia* (2); *New York Life Insurance Co. v. Cravens*. (3) If s. 91, head (2.), covers this legislation, there is no valid reason why express power should have been given to the Dominion Legislature in the case of banking.

The legislation was not authorized under the general power to legislate for the peace, order, and good government of Canada, because it affects civil rights in the provinces. The importance of a subject-matter does not bring it within the general power so as to exclude s. 92, head (13.). This appears from the express exception introduced into s. 92, head (10), as to shipping and railways, and from the judgment in the *Prohibition Case*. (4)

Newcombe, K.C., in reply. There is no decided case which adversely affects the proposition that in its Canadian and National aspect the liquor trade may be regulated by the Dominion Legislature under s. 91, head (2.). The McCarthy Act was invalid because it related to private and local matters, not because it dealt with a particular trade. The Dominion Legislature has made laws with regard to the grain trade: see R. S. Can., 1906, cc. 65, 83, and 133. [*Attorney-General of Ontario v. Mercer* (5) and *Royal Bank of Canada v. The King* (6) were referred to.]

1916. Feb. 24. The judgment of their Lordships was delivered by

1916 1 A.C. p. 594. VISCOUNT HALDANE. This is an appeal from a judgment of the Supreme Court of Canada answering certain questions put to the judges by a reference from the Government of the Dominion. The questions so referred were as follows:—

1. Are ss. 4 and 70 of the Insurance Act, 1910, or any and what part or parts of the said sections, ultra vires of the Parliament of Canada?

2. Does s. 4 of the Insurance Act, 1910, operate to prohibit an insurance company incorporated by a foreign State from carrying on the business of insurance within Canada, if such company does not hold a licence from the Minister under the said Act, and if such carrying on of the business is confined to a single province?

(1) (1889) 14 App. Cas. 381.

(2) (1868) 75 U.S. 168, 183.

(3) (1899) 178 U.S. 389, 401.

(4) [1896] A.C. 348.

(5) (1883) 8 App. Cas. 767.

(6) [1913] A.C. 283.

Sect. 4 is in these terms: "In Canada, except as otherwise provided by this Act, no company or underwriters or other person shall solicit or accept any risk, or issue or deliver any receipt or policy of insurance, or grant any annuity on a life or lives, or collect or receive any premium, or inspect any risk, or adjust any loss, or carry on any business of insurance, or prosecute or maintain any suit, action, or proceeding, or file any claim in insolvency relating to such business, unless it be done by or on behalf of a company or underwriters holding a licence from the Minister." The Minister is defined in the Act to mean the Minister of Finance of the Dominion.

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Sect. 70 is an ancillary section which imposes a penalty on every person who contravenes or attempts to contravene the provisions of the above and other sections. Sect. 3 provides that the provisions of the Act shall not apply to any contract of marine insurance effected in Canada by any company authorized to carry on such business within Canada, nor to any company incorporated by an Act of the late province of Canada, or by an Act of the Legislature of any province now forming part of Canada, which carries on the business of insurance wholly within the limits of the province by the Legislature of which it was incorporated, and which is within the exclusive control of the Legislature of such province. Sect. 3 also provides that any such company as is last described may, by leave of the Governor in Council, avail itself of the provisions of this Act on complying with the provisions thereof, and that if it so avails itself these provisions shall then apply to it, and such company shall thereafter have the power of transacting its business of insurance throughout Canada. Sect. 12 enacts that no licence shall be granted to any individual underwriter or underwriters to carry on any kind of insurance business, excepting in the case of associations of individuals formed upon the plan known as Lloyd's, under which each associate underwriter becomes liable for a proportionate part of the whole amount insured by a policy. The act contains other restrictive and regulative provisions.

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It will be observed that s. 4 deprives private individuals of their liberty to carry on the business of insurance, even when that business is confined within the limits of a province. It will also be observed that even a provincial company operating within the limits of the province where it has been

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incorporated cannot, notwithstanding that it may obtain permission from the authorities of another province, operate within that other province without the licence of the Dominion Minister. In other words, the capacity is interfered with which, according to the judgment just delivered by their Lordships in the case of the Bonanza Company (1), such a company possesses to take advantage of powers and rights proffered to it by authorities outside the provincial limits. Such an interference with its status appears to their Lordships to interfere with its civil rights within the province of incorporation, as well as with the power of the Legislature of every other province to confer civil rights upon it. Private individuals are likewise deprived of civil rights within their provinces.

It must be taken to be now settled that the general authority to make laws for the peace, order, and good government of Canada, which the initial part of s. 91 of the British North America Act confers, does not, unless the subject-matter of legislation falls within some one of the enumerated heads which follow, enable the Dominion Parliament to trench on the subject-matters entrusted to the provincial Legislatures by the enumeration in s. 92. There is only one case, outside the heads enumerated in s. 91, in which the Dominion Parliament can legislate effectively as regards a province, and that is where the subject-matter lies outside all of the subject-matters enumeratively entrusted to the province under s. 92. *Russell v. The Queen* (2) is an instance of such a case. There the Court considered that the particular subject-matter in question lay outside the provincial powers. What has been said in subsequent cases before this Board makes it clear that it was on this ground alone, and not on the ground that the Canada Temperance Act was considered to be authorized as legislation for the regulation of trade and commerce, that the Judicial Committee thought that it should be held that there was constitutional authority for Dominion legislation which imposed conditions of a prohibitory character on the liquor traffic throughout the Dominion. No doubt the Canada Temperance Act contemplated in certain events the use of different licensing boards and regulations in different districts and to this extent legislated in relation to local institutions. But the Judicial Committee appear to

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(1) See ante, p. 566. (A.C.)

(2) 7 App. Cas. 829.

have thought that this purpose was subordinate to a still wider and legitimate purpose of establishing a uniform system of legislation for prohibiting the liquor traffic throughout Canada excepting under restrictive conditions. The case must therefore be regarded as illustrating the principle which is now well established, but none the less ought to be applied only with great caution, that subjects which in one aspect and for one purpose fall within the jurisdiction of the provincial Legislatures may in another aspect and for another purpose fall within Dominion legislative jurisdiction. There was a good deal in the Ontario Liquor Licence Act, and the powers of regulation which it entrusted to local authorities in the province, which seems to cover part of the field of legislation recognized as belonging to the Dominion in *Russell v. The Queen*. (1) But in *Hodge v. The Queen* (2) the Judicial Committee had no difficulty in coming to the conclusion that the local licensing system which the Ontario statute sought to set up was within provincial powers. It was only the converse of this proposition to hold, as was done subsequently by this Board, though without giving reasons, that the Dominion licensing statute, known as the McCarthy Act, which sought to establish a local licensing system for the liquor traffic throughout Canada, was beyond the powers conferred on the Dominion Parliament by s. 91. Their Lordships think that as the result of these decisions it must now be taken that the authority to legislate for the regulation of trade and commerce does not extend to the regulation by a licensing system of a particular trade in which Canadians would otherwise be free to engage in the provinces. Sect. 4 of the statute under consideration cannot, in their opinion, be justified under this head. Nor do they think that it can be justified for any such reasons as appear to have prevailed in *Russell v. The Queen*. (1) No doubt the business of insurance is a very important one, which has attained to great dimensions in Canada. But this is equally true of other highly important and extensive forms of business in Canada which are to-day freely transacted under provincial authority. Where the British North America Act has taken such forms of business out of provincial jurisdiction, as in the case of banking, it has done so by express words which would have been unnecessary had the argument for the

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(1) 7 App. Cas. 829.

(2) 9 App. Cas. 117.

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Dominion Government addressed to the Board from the Bar been well founded. Where a company is incorporated to carry on the business of insurance throughout Canada, and desires to possess rights and powers to that effect operative apart from further authority, the Dominion Government can incorporate it with such rights and powers, to the full extent explained by the decision in the case of *John Deere Plow Co. v. Wharton*. (1) But if a company seeks only provincial rights and powers, and is content to trust for the extension of these in other provinces to the Governments of those provinces, it can at least derive capacity to accept such rights and powers in other provinces from the province of its incorporation, as has been explained in the case of the Bonanza Company. (2)

Their Lordships are therefore of opinion that the majority in the Supreme Court were right in answering the first of the two questions referred to them in the affirmative.

The second question is, in substance, whether the Dominion Parliament has jurisdiction to require a foreign company to take out a licence from the Dominion Minister, even in a case where the company desires to carry on its business only within the limits of a single province. To this question their Lordship's reply is that in such a case it would be within the power of the Parliament of Canada, by properly framed legislation, to impose such a restriction. It appears to them that such a power is given by the heads in s. 91, which refer to the regulation of trade and commerce and to aliens. This question also is therefore answered in the affirmative.

1916 1 A.C.
p. 598. Their Lordships will therefore humbly advise His Majesty that the questions referred to should be answered as now indicated. Following the usual practice, there will be no order as to costs.

Solicitors for appellant: *Charles Russell & Co.*

Solicitors for respondents: *Blake & Redden, Lawrence Jones & Co.*

Solicitors for intervener: *Gard, Lyell, Betenson & Davidson.*

(1) [1915] A.C. 330.

(2) Ante, p. 566. (A.C.)

[PRIVY COUNCIL.]

ATTORNEY-GENERAL FOR THE
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AND

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INTERVENER.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada — Legislative Authority of Dominion — Legislative Authority of Provinces—Incorporation of Companies—Powers and Capacity—Insurance—British North America Act, 1867 (30 & 31 Vict. c. 3), ss. 91, 92.

Questions referred to the Supreme Court of Canada as to the power and capacity of companies incorporated under provincial legislative authority and as to the power of the provincial Legislatures to restrict the operations of companies incorporated under Dominion legislative authority answered by reference to the judgments of the Board in *John Deere Plow Co. v. Wharton* [1915] A.C. 330; *Bonanza Creek Gold Mining Co. v. The King*, ante, p. 566; and *Attorney-General for Canada v. Attorney-General for Alberta*, ante, p. 588.

APPEAL, by special leave, from opinions of the Supreme Court of Canada (October 14, 1913) upon a reference.

The Governor-General in Council by an Order under the Supreme Court Act (R. S. Can., 1906, c. 139), s. 60, referred to that Court the following questions for hearing and consideration:—

1. What limitation exists under the British North America Act, 1867, upon the power of the provincial Legislatures to incorporate companies?

What is the meaning of the expression “with provincial objects” in s. 92, art. 11, of the said Act? Is the limitation thereby defined territorial, or does it have regard to the character of the powers which may be conferred upon companies locally incorporated, or what otherwise is the intention and effect of the said limitation?

*Present: LORD BUCKMASTER L.C., VISCOUNT HALDANE, LORD PARKER OF WADDINGTON, and LORD SUMNER.

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2. Has a company incorporated by a provincial Legislature under the powers conferred in that behalf by s. 92, art. 11, of the British North America Act, 1867, power or capacity to do business outside the limits of the incorporating province? If so, to what extent and for what purpose?

Has a company incorporated by a provincial Legislature for the purpose, for example, of buying and selling or grinding grain the power or capacity, by virtue of such provincial incorporation, to buy or sell or grind grain outside of the incorporating province?

3. Has a corporation constituted by a provincial Legislature with power to carry on a fire insurance business, there being no stated limitation as to the locality within which the business may be carried on, power or capacity to make and execute contracts (a) within the incorporating province insuring property outside of the province; (b) outside of the incorporating province insuring property within the province; (c) outside of the incorporating province insuring property outside of the province?

Has such a corporation power or capacity to insure property situate in a foreign country, or to make an insurance contract within a foreign country?

Do the answers to the foregoing inquiries or any and which of them depend upon whether or not the owner of the property or risk insured is a citizen or resident of the incorporating province?

4. If in any or all of the above-mentioned cases, (a), (b), and (c), the answer be negative, would the corporation have throughout Canada the power or capacity mentioned in any and which of the said cases, on availing itself of the Insurance Act, 1910 (9 & 10 Edw. 7, c. 32), s. 3, sub-s. 3?

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p. 600. Is the said enactment the Insurance Act, 1910 (9 & 10 Edw. 7, c. 32), s. 3, sub-s. 3, intra vires of the Parliament of Canada?

5. Can the powers of a company incorporated by a provincial Legislature be enlarged, and to what extent, either as to locality or objects by (a) the Dominion Parliament; (b) the Legislature of another province?

6. Has the Legislature of a province power to prohibit companies incorporated by the Parliament of Canada from carrying on business within the province unless or until the

companies obtain a licence so to do from the Government of the province, or other local authority constituted by the Legislature, if fees are required to be paid upon the issue of such licences?

For examples of such provincial legislation see Ontario, 63 Vict. c. 24; New Brunswick, Cons. Stats., 1903, c. 18; British Columbia, 5 Edw. 7, c. 11.

7. Is it competent to a provincial Legislature to restrict a company incorporated by the Parliament of Canada for the purpose of trading throughout the whole Dominion in the exercise of the special trading powers so conferred or to limit the exercise of such powers within the province?

Is such a Dominion trading company subject to or governed by the legislation of a province in which it carries out or proposes to carry out its trading powers limiting the nature or kinds of business which corporations not incorporated by the Legislature of the province may carry on, or the powers which they may exercise within the province, or imposing conditions which are to be observed or complied with by such corporations before they can engage in business within the province?

Can such a company so incorporated by the Parliament of Canada be otherwise restricted in the exercise of its corporate powers or capacity, and how and in what respect by provincial legislation?

The questions were argued before the Supreme Court of Canada, consisting of Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff, Anglin, and Brodeur JJ., in February, 1913.

The learned judges delivered their opinions, which are reported at 48 Can. S. C. R. 331, on October 14, 1913. It would appear that from the nature of the questions submitted and the variety of conclusions reached by the individual judges it was not possible for the Court to return answers to the questions. The various opinions are summarized in the head-note to that report.

The Attorneys-General for the provinces appealed by special leave.

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So far as the questions referred were involved in the appeal in *Bonanza Creek Gold Mining Co. v. The King* (1) they were argued upon the hearing of that appeal. The names of the counsel appearing are stated in the report of that appeal.

1915. Dec. 17. At the conclusion of the argument of the above-mentioned appeal,

Sir R. Finlay, K.C., for the appellants, said that the arguments already adduced in the Insurance Act reference (ante, p. 588) and in the *Bonanza Co.'s Case* (1) covered all the questions which the appellants desired to argue and which had not already been dealt with by the judgment of the Board in *John Deere Plow Co. v. Wharton*. (2)

Newcombe, K.C., in reference to question 4 as to s. 3, sub-s. 3, of the Insurance Act, 1910, cited *Valin v. Langlois*. (3)

1916. Feb. 24. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. Of the questions before the Board in this appeal some have already been disposed of by the Judgments already delivered in the cases of *John Deere Plow Co. v. Wharton* (2), *Bonanza Creek Gold Mining Co. v. The King* (1), and the Insurance Act reference (5). In the first of these cases, in which the judgments in the Supreme Court of Canada in the present reference were brought to their notice, their Lordships indicated that the task of answering the questions on the interpretation of the British North America Act imposed on the learned judges in the Court below was one which it was, in their own opinion, impossible satisfactorily to accomplish. They gave reasons for thinking that the abstract and general character of the questions put rendered it unsafe in the interests of justice to future suitors to attempt to answer them completely. Their Lordships are desirous of rendering all the assistance they can to the Governments of the Dominion and the provinces in the work, which is often difficult, of securing adequate assistance in the interpretation of the Constitution of Canada and the consequent framing of legislation. But, for reasons several times assigned in earlier judgment of the Judicial Committee, they feel the paramount importance of abstain-

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(1) Ante, p. 566. (A.C.)

(2) [1915] A.C. 330.

(3) (1879) 5 App. Cas. 115.

(4) Ante, p. 588. (A.C.)

(5) Ante, p. 00.

ing as far as possible from deciding questions such as those now stated until they come up in actual litigation about concrete disputes rather than on references of abstract propositions.

However, it so happens that on the present occasion most of the questions raised have been disposed of in the judgments in the three cases already referred to, and their Lordships will shortly indicate how far they consider this to have been done.

Questions 1 and 2 are answered as sufficiently as is expedient in the judgment given in *Bonanza Creek Gold Mining Co. v. The King*. (1)

Questions 3 and 4 are sufficiently disposed of by the judgments in the *Bonanza Case* (1) and *Attorney-General for Canada v. Attorney-General for Alberta*. (2)

As to question 5, their Lordships think it unnecessary to add to what they have said at length in the judgment in the *Bonanza Case*. (1)

As to questions 6 and 7, their Lordships have endeavoured in the case of the *John Deere Plow Co. v. Wharton* (3) to give as much assistance as is practicable in answering these questions. The questions are, however, in some of their developments of a highly abstract character, and the Board is of opinion that it is not prudent to go further than was done in the judgment in that case.

Their Lordships will humbly advise His Majesty that the answers to the questions brought before them on this appeal should be to the effect above indicated. There will be no order as to costs.

Solicitors for the appellants: *Blake & Redden*.

Solicitors for respondent: *Charles Russell & Co.*

Solicitors for Attorney-General for British Columbia, intervener: *Gard, Lyell, Betenson & Davidson*.

Solicitors for Canadian Manufacturers Association, interveners: *Lawrence Jones & Co.*

(1) Ante, p. 566. (A.C.)

(2) Ante, p. 588. (A.C.)

(3) [1915] A.C. 330

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ON APPEAL FROM THE SUPREME COURT OF CANADA.

*Canada—Legislative Authority of Province—Incorporation of Companies—
“With provincial objects”—Capacity outside Province—Letters Patent—
Prerogative Power—Yukon Territory—Free Miners’ Certificate—“Canadian
Charter”—British America Act, 1867 (30 & 31 Vict. c. 3), ss. 12, 46, 91,
92—Ontario Companies Act (R.S. Ont., 1897, c. 191), s. 9.*

Sect. 92 of the British North America Act, 1867, confines the actual powers and rights which a provincial Government can bestow upon a company, either by legislation or through the Executive, to powers and rights exercisable within the province, but does not preclude a province either from keeping alive the then existing power of the Executive to incorporate by charter so as to confer a general capacity analogous to that of a natural person, or to legislate so as to create, by or by virtue of a statute, a corporation with this general capacity. The power of incorporation by charter transferred to the Lieutenant-Governor of the province of Ontario by s. 65 of the above mentioned Act has not been abrogated or interfered with by the Ontario Companies Act (R. S. Ont., 1897, c. 191).

The doctrine of *Ashbury Railway Carriage and Iron Co. v. Riche* (1875) L. R. 7 H. L. 653 does not apply to a company which derives its existence from the act of the Sovereign and not merely from the regulating statute:—

Held, therefore, that a company incorporated by letters patent issued by the Lieutenant-Governor of Ontario under the Ontario Companies Act (R. S. Ont., 1897, c. 191), s. 9, with the object of carrying on the business of mining, has a status and capacity which enable it to accept and exercise mining leases and rights in the Yukon Territory conferred by the authorities of the Dominion and the Yukon Territory.

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Held, further, that a company incorporated under the Ontario Companies Act is “incorporated under a Canadian charter” within the meaning of the regulations governing the issue of a free miner’s certificate in the Yukon Territory.

**Present*: LORD BUCKMASTER, L.C., VISCOUNT HALDANE, LORD PARKER OF WADDINGTON, and LORD SUMNER.

APPEAL, by special leave, from a judgment of the Supreme Court of Canada (February 2, 1915) affirming the judgment of the Exchequer Court of Canada.

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The appellants were incorporated on Dec. 23, 1904, by letters patent issued by the Lieutenant-Governor of the province of Ontario under the authority of the Ontario Companies Act (R. S. Ont., 1897, c. 191) and of any other power or authority vested in him. The purpose and objects of the company stated in the letters patent were, so far as material, to carry on the business of mining and exploration in all their branches, and for such purposes to acquire by purchase, lease, or otherwise rights, powers, and concessions to enable the company properly to exercise and carry on all or any of its rights, powers, and objects. There were no words which limited the area of the company's operations. For some years prior to the litigation the appellants had been operating certain hydraulic mining properties in the Yukon. The properties were the subject of leases granted by the Crown through the Minister of the Interior for Canada, of which leases the appellants were assignees with the consent of the Crown. In 1907 the Crown leased to the appellants further claims. There had also been issued to the appellants a free miner's certificate, dated December 24, 1904, under the regulations governing placer mining in the Yukon (Stat. of Can., 1 Edw. 7, p. xlix.), and a licence, dated September 7, 1905, from the Yukon Commissioner, under s. 2, sub-s. 2, of the Foreign Companies Ordinance (Consolidated Ordinances of the Yukon Territories, 1902, c. 59), the latter authorizing them to carry on their business in the Yukon.

By a petition of right, dated January 27, 1908, the appellants claimed damages in respect of alleged breaches by the Crown of agreements contained in the leases. The Crown delivered an answer by which it was denied that the appellants had any power to carry on mining or to hold mining leases in the Yukon, and it was further pleaded that there was no power to grant a free miner's certificate to the appellants, a provincial company, nor power in them to accept one. The material paragraphs of the answer are set out in the judgment.

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The Exchequer Court of Canada stayed the proceedings pending the determination by that Court of the questions of

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law so raised; upon their argument Cassels J. dismissed the petition of right.

Upon appeal to the Supreme Court of Canada, a majority of that Court (Sir C. Fitzpatrick C.J. with Davies and Duff JJ., Idington and Anglin JJ. dissenting) affirmed the decision of Cassels J. The majority were of opinion that the appellants under their letters patent of incorporation had neither the power nor capacity to carry on mining outside the province of Ontario. The appeal is reported, 50 Can. S. C. R. 534.

The appellants appealed by special leave. The Board directed that the arguments in *Attorney-General for Ontario v. Attorney-General for Canada*, reported post, p. 598, so far as that appeal involved questions arising in the present appeal, should be heard together with the present appeal, the parties in both appeals being heard.

The following counsel appeared:—*Hellmuth, K.C.*, and *Moss, K.C.*, for the appellants; *Newcombe, K.C.*, *Barrington-Ward* (for *R. Asquith*, serving with His Majesty's Forces), and *G. W. Mason*, for the respondents; *Sir R. Finlay, K.C.*, *Nesbitt, K.C.*, *Laflour, K.C.*, *Geoffrion, K.C.*, and *Hon. M. Macnaughten* (for *G. Lawrence*, serving with His Majesty's Forces), for the Attorneys-General for Ontario, Quebec, Nova Scotia, and New Brunswick; *Lancot, K.C.*, for the Attorney-General for Quebec; *Parlee, K.C.*, and *H. Douglas* (for *Sir H. Greenwood*, serving with His Majesty's Forces), for the Attorney-General for Alberta; *Bayly, K.C.*, for the Attorney-General for Ontario; *H. Douglas*, for the Attorney-General for British Columbia; all the above Attorneys-General for provinces being interveners.

In *Attorney-General for Ontario v. Attorney-General for Canada* the appellant and the intervening Attorneys-General for provinces were represented as above stated, and there also appeared:—*Newcombe, K.C.*, and *Barrington-Ward*, for the respondent Attorney-General for Canada; *Wegenast*, for the interveners the Canadian Manufacturers Association.

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p. 569. In the following note of the argument only those counsel who addressed the Board are mentioned.

1915. Dec. 10, 13, 14, 15, 16, 17. *Sir R. Finlay, K.C.*, and *Nesbitt, K.C.*, for the Attorneys-General for the provinces above stated, appellants and interveners; *Hellmuth, K.C.*, and *Moss, K.C.*, for the appellants, the Bonanza Creek

Gold Mining Company. Even if the Bonanza Creek Company had not power under their letters patent of incorporation to hold land or to mine in the Yukon, the Crown recognized the right and title of the company as complete against the Crown by (1.) the grant of a free miner's certificate, (2.) the grant of a licence under the Foreign Companies Ordinance, and (3.) the grant of the lease of March 16, 1907, with the acceptance of rent thereunder. The Crown had power under the Foreign Companies Ordinance to grant licences to companies which otherwise had no power to mine in the Yukon. For the reasons given by Duff J. in the Supreme Court the appellants were incorporated under a "Canadian charter" within the meaning of the placer mining regulations and consequently were entitled to hold a free miner's certificate. The acts of the Crown cure all defects; its grant of the licence and lease amounted to a new incorporation for the purpose of the grant: *Thompson on Corporations*, 2nd ed., vol. 1, p. 269; *Comanche County v. Lewis*. (1) There is to be implied a new incorporation by the Crown in the right of the Dominion, and the validity of this incorporation depends upon the law in the Yukon, not upon that in Ontario. Turning to the more general question of the provincial power under s. 92, head (11.), of the British North America Act, 1867, to legislate for the incorporation of companies "with provincial objects," the effect of that enumeration is that a provincial Legislature can only confer upon a company the right to carry on its business in the province, but the corporation which it creates has the capacity, as a legal entity, to carry on business in any province or country which allows it to do so. The personality of a corporation is recognized in foreign countries by comity of nations: *Bar's Private International Law* (Gillespie's translation), 2nd ed., p. 227; the same principle applies between the provinces. The decision in *Ashbury Railway Carriage and Iron Co. v. Riche* (2) turned upon the words of the English Companies Act, 1862, and does not apply to an incorporation by letters patent. The British North America Act, 1867, by ss. 12 and 65 transferred to the Lieutenant-Governor of Ontario the prerogative power of incorporation in relation to that province previously existing under the Companies Act, 1864 (27 & 28 Vict. c. 23, Province of Canada). The effect of the Ontario Companies Act (R. S. Ont., 1897, c. 191), s. 9,

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(1) (1889) 133 U.S. 198, 202.

(2) L.R. 7 H.L. 653.

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under which the Bonanza Company received its charter, is that the Lieutenant-Governor can incorporate only for a purpose comprised in s. 92, head (11.), but the corporate body so created has all the capacity of a common law corporation: see per Lord Blackburn in *Riche v. Ashbury Railway Carriage and Iron Co.* (1) in the Exchequer Chamber. [*Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick* (2) was also referred to.] If an Ontario company has not the capacity to exercise its objects in other provinces, by comity of those provinces, neither has a Dominion company capacity to do so outside the Dominion, for s. 5 of the Companies Act of Canada (R. S. Can., 1906, c. 79) is in the same language as s. 9 of the Ontario Companies Act.

Further, the words “with provincial objects” in s. 92, head (11.), mean with objects other than those as to which the Dominion has express powers (e.g., banking). The words do not impose a territorial limit upon the exercise of the objects. The similar words “for provincial purposes” in s. 92, head (9.), clearly do not preclude taxation for expenditure outside the province—for example, for the maintenance of agents-general. A provincial Legislature could incorporate a company to promote in Great Britain emigration into the province; that would be a provincial object, but would be excluded by the territorial limitation. [*Canadian Pacific Railway v. Ottawa Fire Insurance Co.* (3), *Colonial Building and Investment Association v. Attorney-General of Quebec* (4), *Dobie v. Temporalities Board* (5), and *La Compagnie Hydraulique de St. François v. Continental Heat and Light Co.* (6) were referred to.] Since 1867 the Dominion Government has recognized that provincial companies have capacity outside the province of incorporation. A very large part of the business of Canada is done by provincial companies trading outside their province of incorporation. An application of the territorial limitation would have serious effects, which cannot satisfactorily be bridged by the doctrine of ancillary powers. If the meaning of s. 92, head (11.), is doubtful, the Board should hesitate to adopt a construction which would give rise to great inconveniences in trade.

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(1) (1874) L.R. 9 Ex. 224, 263.
(2) [1892] A.C. 437, 442.
(3) (1907) 39 Can. S.C.R. 405.

(4) (1885) 9 App. Cas. 157.
(5) (1882) 7 App. Cas. 136.
(6) [1909] A.C. 194.

Newcombe, K.C., and *G. W. Mason*, for the respondent. The appellants the Bonanza Creek Company were not entitled to mine in the Yukon Territory, (1.) because the province of Ontario had power only to incorporate companies with provincial objects; (2.) because they were not competent to hold a free miner's certificate. The latter reason is dealt with first. The placer mining regulations (1 Edw. 7, p. xlix.) define a joint stock company to which a certificate may be granted as "any company incorporated for mining purposes under a Canadian charter or licensed by the Government of Canada." A Canadian charter means a charter granted under Dominion powers. This appears from the alternative licence referred to. Further, all public land, including mines, in the Yukon vested in the Crown in the right of the Dominion, and the regulations were made under the Dominion Lands Act (R. S. Can., 1886, c. 54), s. 47, as amended by 55 & 56 Vict. (Can.) c. 15, s. 5. The intention was that the local Legislatures should have no power to legislate in the matter. The Dominion statute 61 Vict. c. 49, which empowered the Secretary of State to grant to mining companies powers to mine in the Yukon, expressly applies only to companies incorporated in the United Kingdom and in foreign countries. The licence granted under the Foreign Companies Ordinance could not make good the inherent want of capacity in the appellants. The holding of a valid free miner's certificate was a condition precedent to the validity of the leases. Both the certificate and the licence were issued under taxing enactments; they do not amount to a recognition by the Crown of the appellant's right to mine in the Yukon.

The contention that the exercise of the prerogative power by the letters patent conferred capacity outside the province was not advanced in the Courts in Canada and is invalid. Sect. 65 of the British North America Act, 1867, only preserves in the Lieutenant-Governor those prerogative powers which are capable of being exercised in relation to the Government of Ontario, and by s. 92, head (11.), the only powers which are capable of being so exercised in relation to the incorporation of companies are limited to the incorporation of companies with provincial objects. The Act effects a division of the executive powers between the Governor-General and the Lieutenant-Governors of Ontario and Quebec; the only key to the limits of their respective

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authorities is furnished by ss. 91 and 92. The Ontario Companies Act, s. 9, merely delegates to the Lieutenant-Governor the provincial powers of the Legislature; the corporation created under s. 9 is further described by ss. 4, 25, 102, and 105. The principle of *Ashbury Railway Carriage and Iron Co. v. Riche* (1) applies and is fatal to the argument based upon capacity outside the province. [*London County Council v. Attorney-General* (2) and *Attorney-General v. Great Eastern Ry. Co.* (3) were also referred to.] Recognition by comity can only be to the extent of the powers of the corporation: *Canadian Southern Ry. Co. v. Gebhard* (4); *Colquhoun v. Hedon* (5). The intention of s. 92 was to confer purely local powers: *Prohibition Case*. (6) The Ontario Legislature is not incorporating a company with provincial objects if the effect is to give it capacity in another province; the capacity to mine in a province is a matter of civil rights in that province. *Dobie v. Temporalities Board* (7) shows that the provinces by joint action cannot effect a legislative object assigned to the Dominion Legislature. The word "objects" in s. 92, head (11.), has the same meaning as in a memorandum of association, namely, the things to do which the company is incorporated. Mining as an object can only be a provincial object by its exercise being limited to a province, and the province must be that which incorporates the company.

Wegenast, for the Canadian Manufacturers Association. A provincial company is not inherently incapable of entering into transactions incidental to its objects outside the incorporating province. In considering what it validly may do outside the province the distinction is between powers and transactions, not between functional and ancillary powers.

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Sir R. Finlay, K.C., replied.

1916. Feb. 24. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. This is an appeal from a judgment of the Supreme Court of Canada in a petition of right which gave rise to questions of constitutional importance as to

(1) L. R. 7 H. L. 653.

(2) [1902] A. C. 165.

(3) (1880) 5 App. Cas. 473.

(4) (1883) 109 U. S. 527.

(5) (1890) 24 Q. B. D. 491.

(6) [1896] A. C. 348, 363.

(7) 7 App. Cas. 136.

the position of joint stock companies, incorporated within the provinces, but seeking to carry on their business beyond the provincial boundaries.

The appellants were incorporated in Ontario by letters patent dated December 23, 1904, and issued under the authority of the Ontario Companies Act, and by virtue of any other authority or power then existing, in the name of the Sovereign and under the Great Seal of the province, by its Lieutenant-Governor. The letters patent recite that this Act authorizes the Lieutenant-Governor in Council by letters patent under the Great Seal to create and constitute bodies corporate and politic for any of the purposes or objects to which the legislative authority of the province extends. They go on to incorporate the company to carry on the businesses of mining and exploration in all their branches, and to acquire real and personal property, including mining claims, with incidental powers. There are no words which limit the area of operation or prohibit the company from carrying out its objects beyond the provincial boundaries.

In the years 1899 and 1900 the Crown, through the Minister of the Interior of the Dominion, had granted to predecessors in title of the appellants leases of certain tracts of land, in what is now the Yukon district, for the purpose of hydraulic mining. Two of these leases contained exclusions of so much of the tracts as had been taken up and entered for placer mining claims. In the year 1900 the Crown entered into agreements with these predecessors in title to the effect that, if any of the placer mining claims within the tracts should be forfeited or surrendered, the Crown would include them in the tracts by supplementary leases. The original leases having subsequently been assigned to the appellants, and certain of the placer mining claims having reverted, the Crown purported in 1907 to demise to the appellants these claims, and to agree to demise to them such other of the claims as might thereafter revert for the same terms of years as those for which the original leases were granted.

In 1906 the Minister of the Interior of the Dominion had purported to issue to the appellants a free miner's certificate. This certificate was issued in conformity with certain regulations under an Order in Council made under the provisions

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of the Dominion Lands Act, which gives the right to a free miner's certificate to persons of over eighteen and to joint stock companies, the latter being defined to include any company incorporated "for mining purposes under a Canadian charter or licensed by the Government of Canada."

When the Yukon district was, by the statute passed by the Dominion Parliament in 1899, made a separate territory, power to make ordinances was conferred on the Commissioner of the territory. Under this power the Foreign Companies Ordinance was passed, under which any company, incorporated otherwise than by or under the authority of an ordinance of the territory or an Act of the Parliament of Canada, was required to obtain a licence under the ordinance to carry on its business in the Yukon territory. Such a licence when issued was made sufficient evidence in the Courts of the territory of the due licensing of the company. In September, 1905, the appellants obtained such a licence.

In 1908 the appellants presented a petition of right in the Exchequer Court of Canada, alleging that, in breach of the agreement entered into by the Crown, placer mining claims which had reverted to the Crown and should have been leased to the appellants had been wrongfully withheld from the appellants, and that by reason of this and of other breaches of the agreement the appellants had suffered heavy damage, for which they as suppliants prayed compensation. The respondent delivered an answer to the petition of right, the first two paragraphs of such answer being as follows: "1. The respondent denies that the suppliant has now or ever has had the power, either under letters patent, licence, free miner's certificate, or otherwise, to carry on the business of mining in the district of the Yukon, or to acquire any mines, mining claims, or mining locations therein, or any estate or interest by way of lease or otherwise in any such mines, mining claims, or locations. 2. Should a free miner's certificate have been issued to the suppliant, the respondent claims that the same is and always has been invalid and of no force or effect, that there was no power to issue a free miner's certificate to the suppliant, a company incorporated under provincial letters patent, and that there was no power vested in the suppliant to accept such a certificate."

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Cassels J., the judge of the Exchequer Court, ordered the questions of law raised by these paragraphs of the

answer to be disposed of, and pending this stayed all other proceedings. He subsequently heard arguments upon the questions thus raised. As the result he decided that he ought to follow what he conceived to be the opinions given by the majority of the judges of the Supreme Court of Canada in a general reference which had been made to them in regard to companies, opinions which are now before this Board for consideration in the appeal which was argued immediately after the present one. He thought that the majority in the Supreme Court had decided that a provincial company was confined in the exercise of its functions to the province where it was incorporated. He therefore dismissed the petition of right, but without costs, on the ground taken in the first of the above quoted paragraphs of the answer. On the narrower ground taken in the second paragraph he did not enter.

There was an appeal to the Supreme Court, and the learned judges were divided in their views. The Chief Justice, Davies J., and Duff J. were of opinion that it was ultra vires of the appellants to exercise powers or to acquire rights outside the boundaries of the province of Ontario. Idington J. and Anglin J. were of a different opinion. They held that, while a provincial company could exercise its powers as of right only within the province where it was incorporated, it was elsewhere in Canada like a foreign company, and had capacity to accept rights and powers conferred on it by comity by another Government.

The majority in the Supreme Court were therefore adverse to the appellants on the first question raised, that as to general capacity. On the question raised by the second paragraph of the answer Duff J. expressed an opinion in favour of the appellants. On the question, which was one of construction, and arose only if he was wrong in his answer to the wider question, he thought that the condition of acquiring, under the Dominion regulations approved by the Order in Council already referred to, the right to a mining location to be worked by hydraulic process was the obtaining a free miner's certificate under the Dominion regulations governing placer mining. Under these regulations a joint stock company might receive such a certificate, if it came within the definition of being "incorporated for mining purposes under a Canadian charter, or licensed by the Government of Canada." Differing from the Chief Justice, who

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had been adverse to the appellants on this point also, Duff J. was of opinion that the expression "Canadian charter" meant, not a charter granted under Dominion authority, but one emanating from any lawful authority in Canada. Otherwise, as he pointed out, a company incorporated by Yukon authority, or by the Council of the North-West Territories before Yukon became a separate territory, would be excluded, along with companies incorporated by the province of Canada before confederation.

Their Lordships have come to the same conclusion on this point as Duff J. They think that the appellants, if they possessed legal capacity to receive such a Dominion certificate, had it validly bestowed on them, and that, if so, they subsequently obtained a good title to the mining locations and also to the Yukon licence to carry on business which was granted to them. This subordinate question ought therefore to be answered in favour of the appellants.

Their Lordships accordingly turn to the larger question raised by the first of the two paragraphs, a question which is of far-reaching importance. It is whether a company incorporated by provincial letters patent, issued in conformity with legislation under s. 92 of the British North America Act, can have capacity to acquire and exercise powers and rights outside the territorial boundaries of the province. In the absence of such capacity the certificates, licences, and leases already referred to were wholly inoperative, for if the company had no legal existence or capacity for purposes outside the boundaries of the province conferred on it by the Government of Ontario, by whose grant exclusively it came into being, it is not apparent how any other Government could bestow on it rights and powers which enlarged that existence and capacity. The answer to this question must depend on the construction to be placed on s. 92 of the British North America Act and on the Ontario Companies Act.

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Sect. 92 confers exclusive power upon the provincial Legislature to make laws in relation to the incorporation of companies with provincial objects. The interpretation of this provision which has been adopted by the majority of the judges in the Supreme Court is that the introduction of the words "with provincial objects" imposes a territorial limit on legislation conferring the power of incorporation so completely that by or under provincial legislation no company can be incorporated with an existence in law that extends

beyond the boundaries of the province. Neither directly by the language of a special Act, nor indirectly by bestowal through executive power, do they think that capacity can be given to operate outside the province, or to accept from an outside authority the power of so operating. For the company, it is said, is a pure creature of statute, existing only for objects prescribed by the Legislature within the area of its authority, and is therefore restricted, so far as legal capacity is concerned, on the principle laid down in *Ashbury Railway Carriage and Iron Co. v. Riche*. (1)

Their Lordships, however, take the view that this principle amounts to no more than that the words employed to which a corporation owes its legal existence must have their natural meaning, whatever that may be. The words of the British Companies Act were construed as importing that a company incorporated by the statutory memorandum of association which the Act prescribes could have no legal existence beyond such as was required for the particular objects of incorporation to which that memorandum limited it. A similar rule has been laid down as regards companies created by special Act. The doctrine means simply that it is wrong, in answering the question what powers the corporation possesses when incorporated exclusively by statute, to start by assuming that the Legislature meant to create a company with a capacity resembling that of a natural person, such as a corporation created by charter would have at common law, and then to ask whether there are words in the statute which take away the incidents of such a corporation. This was held by the House of Lords to be the error into which Blackburn J. and the judges who agreed with him had fallen when they decided in *Riche v. Ashbury Railway Carriage and Iron Co.* (2) in the Court below that the analogy of the status and powers of a corporation created by charter, as expounded in the *Sutton's Hospital Case* (3), should in the first instance be looked to. For to look to that analogy is to assume that the Legislature has had a common law corporation in view, whereas the wording may not warrant the inference that it has done more than concern itself with its own creature. Such a creature, where its entire existence is derived from the statute, will have the incidents which the common law

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(2) L. R. 9 Ex. 224.
(3) (1613) 10 Rep. 1a.

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would attach if, but only if, the statute has by its language gone on to attach them. In the absence of such language they are excluded, and if the corporation attempts to act as though they were not, it is doing what is *ultra vires* and so prohibited as lying outside its existence in contemplation of law. The question is simply one of interpretation of the words used. For the statute may be so framed that executive power to incorporate by charter, independently of the statute itself, which some authority, such as a Lieutenant-Governor, possessed before it came into operation, has been left intact. Or the statute may be in such a form that a new power to incorporate by charter has been created, directed to be exercised with a view to the attainment of, for example, merely territorial objects, but not directed in terms which confine the legal personality which the charter creates to existence for the purpose of these objects and within territorial limits. The language may be such as to show an intention to confer on the corporation the general capacity which the common law ordinarily attaches to corporations created by charter. In such a case a construction like that adopted by Blackburn J. will be the true one.

Applying the principle so understood to the interpretation of s. 92 and of the Ontario Companies Act passed by virtue of it, the conclusion which results is different from that reached by the Court below. For the words of s. 92 are, in their Lordships' opinion, wide enough to enable the Legislature of the province to keep the power alive, if there existed in the Executive at the time of confederation a power to incorporate companies with provincial objects, but with an ambit of vitality wider than that of the geographical limits of the province. Such provincial objects would be of course the only objects in respect of which the province could confer actual rights. Rights outside the province would have to be derived from authorities outside the province. It is therefore important to ascertain what were the powers in this regard of a Lieutenant-Governor before the British North America Act passed, and in the second place what the Ontario Companies Act has really done.

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The Act which was passed by the Imperial Parliament in 1840 (1), in consequence of the report on the state of affairs in Canada made by Lord Durham, united the provinces of

Upper and Lower Canada under a Governor-General, who had power to appoint deputies to whom he could delegate his authority. This Act established a single Legislature for the new United Province of Canada, and shortly after it had passed responsible government was there set up. In 1867 the British North America Act modified the Constitution so established. This Act contained a preamble stating that the provinces of Canada, Nova Scotia, and New Brunswick had expressed their desire to be federally united into one Dominion under the Crown, with a Constitution similar in principle to that of the United Kingdom. In the case of *Attorney-General for the Commonwealth of Australia v. Colonial Sugar Refining Co.* (1) this Board had occasion to comment on the contrast between the principles which underlie the distribution of powers in the Constitutions of Canada and Australia respectively. They drew attention to the fact that the expression "federal" in the preamble of the British North America Act had been used in a somewhat loose fashion, and that the principle actually adopted was not that of federation in the strict sense, but one under which the Constitutions of the provinces had been surrendered to the Imperial Parliament for the purpose of being refashioned. The result had been to establish wholly new Dominion and provincial Governments with defined powers and duties, both derived from the statute which was their legal source, the residual powers and duties being taken away from the old provinces and given to the Dominion. It is to be observed that the British North America Act has made a distribution between the Dominion and the provinces which extends not only to legislative but to executive authority. The executive government and authority over Canada are primarily vested in the Sovereign. But the statute proceeds to enact, by s. 12, that all powers, authorities, and functions which by any Imperial statute or by any statute of the provinces of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick are at the Union vested in or exercisable by the respective Governors or Lieutenant-Governors of these provinces shall, "as far as the same continue in existence and capable of being exercised after the Union in relation to the government of Canada," be vested in and exercisable by the Governor-General. Sect. 65, on the other hand, provides that all such powers,

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authorities, and functions shall, as far as the same are capable of being exercised after the Union in relation to the government of Ontario and Quebec respectively, be vested in and exercisable by the Lieutenant-Governors of Ontario and Quebec respectively." By s. 64 the constitution of the executive authority in Nova Scotia and New Brunswick was to continue as it existed at the Union until altered under the authority of the Act.

The effect of these sections of the British North America Act is that, subject to certain express provisions in that Act and to the supreme authority of the Sovereign, who delegates to the Governor-General and through his instrumentality to the Lieutenant-Governors the exercise of the prerogative on terms defined in their commissions, the distribution under the new grant of executive authority in substance follows the distribution under the new grant of legislative powers. In relation, for example, to the incorporation of companies in Ontario with provincial objects the powers of incorporation which the Governor-General or Lieutenant-Governor possessed before the Union must be taken to have passed to the Lieutenant-Governor of Ontario so far as concerns companies with this class of objects. Under both s. 12 and s. 65 the continuance of the powers thus delegated is made by implication to depend on the appropriate Legislature not interfering.

There can be (no) (1) doubt that prior to 1867 the Governor-General was for many purposes entrusted with the exercise of the prerogative power of the Sovereign to incorporate companies throughout Canada, and such prerogative power to that extent became after confederation, and so far as provincial objects required its exercise, vested in the Lieutenant-Governors, to whom provincial Great Seals were assigned as evidences of their authority. Whatever obscurity may at one time have prevailed as to the position of a Lieutenant-Governor appointed on behalf of the Crown by the Governor-General has been dispelled by the decision of this Board in *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick*. (2) It was there laid down that "the act of the Governor-General and his Council in making the appointment is, within the meaning of the statute, the act of the Crown; and a Lieutenant-Governor

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(1) Omitted in original.

(2) [1892] A. C. 437, 443.

when appointed, is as much the representative of Her Majesty for all purposes of provincial government as the Governor-General himself is for all purposes of Dominion government."

The form of the commission by which the Governor-General appoints a Lieutenant-Governor to be Lieutenant-Governor of Ontario bears this out. For it runs in the name of the Sovereign, and is "to do and execute all things that shall belong to your said command and the trust we have reposed in you, according to the several provisions and directions granted or appointed you by virtue of the Act of the United Kingdom of Great Britain and Ireland passed in the thirtieth year of the reign of Her late Majesty Queen Victoria, called and known as 'The British North America Act, 1867,' and of all other statutes in that behalf and of this our present commission, according to such instructions as are herewith given to you or which may from time to time be given to you in respect of the said province of Ontario under the sign manual of our Governor-General of our said Dominion of Canada, or by order of our Privy Council of Canada, and according to such laws as are or shall be in force in the said province of Ontario."

Their Lordships have now to consider the question whether legislation before or after confederation has been of such a character that any power of incorporation by charter from the Crown which formerly existed has been abrogated or interfered with to such an extent that companies so created no longer possess that capacity which the charter would otherwise have attached to them.

Prior to confederation, the granting of letters patent under the Great Seal of the province of Canada for the incorporation of companies for manufacturing, mining, and certain other purposes was sanctioned and regulated by the Canadian statute of 1864. (1) This statute authorized the Governor in Council to grant a charter of incorporation to persons who should petition for incorporation for the purposes of the enumerated kinds of business. Applicants for such a charter were to give notice in the *Canada Gazette* of, among other things, the object or purpose for which incorporation was sought. By s. 4 every company so incorporated under that Great Seal for any of the purposes mentioned in this

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(1) 27 & 28 Vict. c. 23 (Province of Canada).

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Act was to be a body corporate capable of exercising all the functions of an incorporated company as if incorporated by a special Act of Parliament. Their Lordships construe this provision as an enabling one, and not as intended to restrict the existence of the company to what can be found in the words of the Act as distinguished from the letters patent granted in accordance with its provisions. It appears to them that the doctrine of *Ashbury Railway Carriage and Iron Co. v. Riche* (1) does not apply where, as here, the company purports to derive its existence from the act of the Sovereign and not merely from the words of the regulating statute. No doubt the grant of a charter could not have been validly made in contravention of the provisions of the Act. But, if validly granted, it appears to their Lordships that the charter conferred on the company a status resembling that of a corporation at common law, subject to the restrictions which are imposed on its proceedings. There is nothing in the language used which, for instance, would preclude such a company from having an office or branch in England or elsewhere outside Canada.

The Dominion Companies Act (c. 79 of the Revised Statutes of 1906) is, so far as Part I. is concerned, framed on the same principle, although the machinery set up is somewhat different. Part II. stands on another footing. This part deals only with companies directly incorporated by special Act of the Parliament of Canada, and to these it is obvious that other considerations may apply. But the companies to which Part I. applies are, like those under the old statute, to be incorporated by letters patent, the only material difference being that the Act enables these to be granted by the Secretary of State under his own seal of office. When granted by s. 5 they constitute the shareholders a body corporate and politic for any of the purposes or objects, with certain exceptions, to which the legislative authority of the Parliament of Canada extends. The Sovereign, through the medium of the Governor-General, in this way delegates the power of incorporation, subject to restrictions on its exercise, to the Secretary of State, and it is by the exercise of the executive power of the Sovereign that the company is brought into existence.

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(1) L. R. 7 H. L. 653.

The Ontario Companies Act, which governs the present case, is c. 191 of the Revised Statutes of the province, 1897. The principle is similar, save that the letters patent are to be granted directly by the Lieutenant-Governor of the province under the Great Seal of Ontario. Excepting in this respect, the provisions of s. 9, which corresponds to s. 5 of the Dominion Act, are substantially the same as those of the latter section, so that, subject to the express restrictions in the statute, it is by the grant under the Great Seal and not by the words of the statute, which merely restrict the cases in which such a grant can be made, that the vitality of the corporation is to be measured. It will be observed that s. 107 enables an extra-provincial company desiring to carry on business within the province of Ontario to do so if authorized by licence from the Lieutenant-Governor, a provision which bears out the view indicated.

It was obviously beyond the powers of the Ontario Legislature to repeal the provisions of the Act of 1864, excepting in so far as the British North America Act enabled it to do this in matters relating to the province. If the Legislature of Ontario had not interfered the general character of an Ontario company constituted by grant would remain similar to that of a Canadian company before confederation.

The whole matter may be put thus: The limitations of the legislative powers of a province expressed in s. 92, and in particular the limitation of the power of legislation to such as relates to the incorporation of companies with provincial objects, confine the character of the actual powers and rights which the provincial Government can bestow, either by legislation or through the Executive, to powers and rights exercisable within the province. But actual powers and rights are one thing and capacity to accept extra-provincial powers and rights is quite another. In the case of a company created by charter the doctrine of ultra vires has no real application in the absence of statutory restriction added to what is written in the charter. Such a company has the capacity of a natural person to acquire powers and rights. If by the terms of the charter it is prohibited from doing so, a violation of this prohibition is an act not beyond its capacity, and is therefore not ultra vires, although such a violation may well give ground for proceedings by way of scire facias for the forfeiture of the charter. In the case of a company the legal existence of which is wholly derived from

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the words of a statute, the company does not possess the general capacity of a natural person and the doctrine of ultra vires applies. Where, under legislation resembling that of the British Companies Act by a province of Canada in the exercise of powers which s. 92 confers, a provincial company has been incorporated by means of a memorandum of association analogous to that prescribed by the British Companies Act, the principle laid down by the House of Lords in *Ashbury Railway Carriage and Iron Co. v. Riche* (1), of course applies. The capacity of such a company may be limited to capacity within the province, either because the memorandum of association has not allowed the company to exist for the purpose of carrying on any business outside the provincial boundaries, or because the statute under which incorporation took place did not authorize, and therefore excluded, incorporation for such a purpose. Assuming, however, that provincial legislation has purported to authorize a memorandum of association permitting operations outside the province if power for the purpose is obtained ab extra, and that such a memorandum has been registered, the only question is whether the legislation was competent to the province under s. 92. If the words of this section are to receive the interpretation placed on them by the majority in the Supreme Court the question will be answered in the negative. But their Lordships are of opinion that this interpretation was too narrow. The words "legislation in relation to the incorporation of companies with provincial objects" do not preclude the province from keeping alive the power of the Executive to incorporate by charter in a fashion which confers a general capacity analogous to that of a natural person. Nor do they appear to preclude the province from legislating so as to create, by or by virtue of statute, a corporation with this general capacity. What the words really do is to preclude the grant to such a corporation, whether by legislation or by executive act according with the distribution of legislative authority, of powers and rights in respect of objects outside the province, while leaving untouched the ability of the corporation, if otherwise adequately called into existence, to accept such powers and rights if granted ab extra. It is, in their Lordships' opinion, in this narrower sense alone that the restriction to provincial objects is to be interpreted. It follows, as the

(1) L. R. 7 H. L. 653.

Ontario Legislature has not thought fit to restrict the exercise by the Lieutenant-Governor of the prerogative power to incorporate by letters patent with the result of conferring a capacity analogous to that of a natural person, that the appellant company could accept powers and rights conferred on it by outside authorities.

The conclusions at which their Lordships have thus arrived are sufficient to enable them to dispose of this appeal; for, according to these conclusions, the appellant company had a status which enabled it to accept from the Dominion authorities the right of free mining, and to hold the leases in question and take the benefit of the agreements relating to the locations in the Yukon district, as well as of the licence from the Yukon authorities.

A yet larger view of the devolution and distribution of executive power in Canada was suggested in some of the arguments addressed to their Lordships from the Bar, and they are aware that this view has been contended for on former occasions in the Dominion. It has been urged in several cases which have occurred that the Governor-General and the Lieutenant-Governors of the provinces, excepting so far as the Royal prerogatives have been reserved expressly or by necessary implication, have the right to exercise them, as though by implication completely handed over and distributed in such a fashion as to cover the whole of the fields to which the self-government of Canada extends. The Governor and the Lieutenant-Governors would thus be more nearly viceroys than representatives of the Sovereign under the restrictions explained in *Musgrave v. Pulido* (1), where it was laid down that, in the case of a Crown Colony, the commission of the Governor must in each case be the measure of his executive authority, a principle which, in such a case as that of a self-governing Dominion like Canada, might find its analogy in the terms not only of the commission but of the statute creating the Constitution.

The argument for the larger view concedes that it is the general rule in the construction of statutes that the Crown is not affected unless there be words to that effect, inasmuch as the law made by the Crown with the assent of the Lords and Commons is enacted *prima facie* for the subject and not for the Sovereign. But this principle of construction

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it is said cannot apply to an Act the expressed object of which is to grant a Constitution with full legislative and executive powers. In the case of such an Act there is therefore no presumption that the general provisions it contains were not intended to include any matter of prerogative which, in the absence of the rule of construction above stated, would fall within the general words employed. For a Constitution, granted to a dominion for regulating its own affairs in legislation and government generally, cannot be created without dealing with the prerogative, and the British North America Act from beginning to end deals with matters of prerogative, for the most part without expressly naming the Sovereign.

If this argument were well founded it would afford a short cut to the solution of the question which has arisen in this appeal. For under the distribution of the prerogative which it assumes it would be difficult to see how a Lieutenant-Governor, placed in the position of a viceroy as regards matters pertaining to the government of his province, could be excluded from the prerogative power of incorporating by charter, unless that power had been expressly taken away by legislation.

But their Lordships abstain from discussing at length the question so raised. They will only say that when, if ever, it comes to be argued points of difficulty will have to be considered. There is no provision in the British North America Act corresponding even to s. 61 of the Australian Commonwealth Act, which, subject to the declaration of the discretionary right of delegation by the Sovereign in ch. 1, s. 2, provides that the executive power, though declared to be in the Sovereign, is yet to be exercisable by the Governor-General. Moreover, in the Canadian Act there are various significant sections, such as s. 9, which declares the executive government and authority over Canada to continue and be vested in the Sovereign; s. 14, which declares the power of the Sovereign to authorize the Governor-General to appoint deputies; s. 15, which, differing from s. 68 of the Commonwealth Act, says that the command in chief of the naval and military forces in Canada is to be deemed to continue and be vested in the Sovereign; and s. 16, which says that, until the Sovereign otherwise directs, the seat of the Government in Canada shall be Ottawa. These and other provisions of the British North America Act appear to

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preserve prerogative rights of the Crown which would pass if the scheme were that contended for, and to negative the theory that the Governor-General is made a viceroy in the full sense, and they point to the different conclusion that for the measure of his powers the words of his commission and of the statute itself must be looked to. In the case of *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick* (1), already referred to, it was said by this Board that the provisions of the Act "nowhere profess to curtail in any respect the rights and privileges of the Crown, or to disturb the relations then subsisting between the Sovereign and the provinces." Properly understood, and subject to such express provisions of the Act as transfer what would otherwise remain prerogative powers, their Lordships are disposed to agree with this interpretation. It is quite consistent with it to hold that executive power is in many situations which arise under the statutory Constitution of Canada conferred by implication in the grant of legislative power, so that where such situations arise the two kinds of authority are correlative. It follows that to this extent the Crown is bound and the prerogative affected. But such a conclusion is a very different one from the far-reaching principle contended for in the argument in question.

For the reasons which they have assigned earlier in this judgment their Lordships will humbly advise His Majesty that this appeal should be allowed, and that the trial of the petition of right should be proceeded with. As these are proceedings arising out of a petition of right with reference to which, under the Petition of Right Act of Canada, there is discretion to award costs as against the Crown, the respondent will pay the appellants' costs here and in the Courts below. There will be no order as to the costs of the interveners.

Solicitors for appellants and interveners: *Blake & Redden.*

Solicitors for respondent: *Charles Russell & Co.*

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[PRIVY COUNCIL.]

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APPELLANTS;

AND

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RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF ONTARIO,
APPELLATE DIVISION.*Canada—Legislative Authority—Work declared for General Advantage of
Canada—Repeal of Declaring Act—British North America Act, 1867 (30
Vict. c. 3), s. 91, sub-s. 29, and s. 92, sub-s. 10(c).*

A declaration made by the Parliament of Canada under s. 92, sub-s. 10 (c), of the British North America Act, 1867, that a provincial work or undertaking is for the general advantage of Canada, whereby under s. 91, sub-s. 29, of that Act the work or undertaking becomes subject to the exclusive legislative authority of the Dominion, can be repealed or varied by a subsequent Act of that Parliament, and thereupon the work or undertaking ceases to be under Dominion authority, or ceases to be so save to the extent then declared.

APPEAL from a judgment of the Supreme Court of Ontario, Appellate Division (November 9, 1915), affirming an order of the Ontario Railway and Municipal Board.

The appellants, who were incorporated in 1892 by an Act of the Legislature of Ontario, owned an electric railway situate wholly within that province. In 1895 permission was obtained from the Railway Committee of Canada for the railway to cross the line of the Grand Trunk Railway. This permission was required in the case of an electric railway by s. 1 of the Railway Act, 1893, of Canada.

By s. 306 of the Railway Act, 1888 (51 Vict. c. 29, Canada), certain named railways, including the Grand Trunk Railway, and "every branch line or railway now or hereafter connecting with or crossing" the named railways, were declared to be works for the general advantage of Canada.

The whole of the Railway Act, 1888, was repealed by s. 310 of the Railway Act, 1903 (3 Edw. 7, c. 58, Canada); that Act,
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by s. 7, declared every provincial railway, steam or electric railway or tramway, connecting with or crossing a Dominion railway to be a work for the general advantage of Canada in respect only of the connection or crossing, and certain other matters. The Act of 1903 was re-enacted with slight modifications by R. S. Can., 1906, c. 37.

On May 10, 1915, the Ontario Railway and Municipal Board, by an order under s. 255 of the Ontario Railway Act (R. S. Ont., 1914, c. 185), required the appellants to provide certain sanitary conveniences upon their cars, which was not one of the matters referred to in s. 7 above mentioned. The order was affirmed upon appeal to the Appellate Division. The learned judges agreed with the view of the above Board that s. 306 of the Railway Act, 1888, applied only to branches of the railways named; they consequently rejected the contention of the appellants that the railway was subject to the exclusive legislative authority of the Parliament of Canada under the British North America Act, 1867, s. 91, sub-s. 29, and s. 92, sub-s. 10 (c); this decision rendered it unnecessary to consider the effect of the repeal of the Railway Act. The judgment is reported at 34 Ont. L. R. 599.

1916. July 18. *Hellmuth, K.C.*, for the appellants. Upon its true construction s. 306 of the Railway Act, 1888, applies to all provincial railways crossing the railways named therein. From the time when the appellants' railway crossed the Grand Trunk Railway it consequently passed under the exclusive legislative authority of the Dominion by reason of s. 91, sub-s. 29, and s. 92, sub-s. 10(c), of the British North America Act. The Provincial Board therefore had no jurisdiction over it. The subsequent repeal of the Act of 1888 does not take away the status which the railway acquired under the declaration in s. 306. There is no power under the British North America Act enabling the Dominion Legislature to hand over its authority to a provincial Legislature. [*Montreal City v. Montreal Street Railway*(1) and *Grand Trunk Ry. Co. v. Hamilton Radial Electric Ry. Co.*(2) were referred to.]

Sir R. Finlay, K.C., and *Tilley, K.C.*, for the respondent Attorney-General. Even if s. 306 of the Railway Act, 1888, can be construed as applying to the appellants' railway, it does not contain an effectual declaration under s. 92, 1916 2 A.C. p. 585.

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(1) [1912] A. C. 333.

(2) (1897) 29 Ont. Rep. 143.

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sub-s. 10(c), of the British North America Act. The declaration must be as to a specific work or undertaking. A general declaration, such as s. 306 is said to amount to, is ultra vires. If s. 306 contains an effectual declaration applicable to the appellants' railway, upon the repeal of that section the railway ceases to be a work declared for the general advantage of Canada. But upon the true construction of s. 306 it applies only to branches of the railways named.

Hellmuth, K.C., in reply. If it is within the competence of the Parliament of Canada to restore to the provincial legislative authority a work which it has declared for the general advantage, it can only do so by express enactment.

The judgment of their Lordships was delivered by

LORD BUCKMASTER L.C. This is an appeal of the Hamilton, Grimsby, and Beamsville Railway Company against a judgment of the Appellate Division of the Supreme Court of Ontario affirming an order of the Ontario Railway and Municipal Board dated May 10, 1915. The order of the Railway Board directed that the appellants should construct certain sanitary conveniences on their railway, and the appeal against that order was brought, not because the appellants objected to the construction of the sanitary conveniences, but because they asserted that the Ontario Railway and Municipal Board had no jurisdiction whatever to make the order, inasmuch as their railway was really a Dominion railway, and not in any way under the control of the Provincial Board.

The facts of the case are these. The appellant company was incorporated by the province of Ontario in 1892. The extent of the railway they were formed to construct and work is some twenty-three miles or thereabouts. It is worked by electric power, and it is wholly situate within the province of Ontario. In 1895 the appellants proposed to carry their railway across the track of the Grand Trunk Railway, and an order was made on January 28, 1895, permitting such crossing. The appellants assert that, by virtue of the British North America Act of 1867 and the Railway Act of Canada of 1888, the effect of that order was to take their railway out of the jurisdiction of the province of Ontario and place it within the category of a Dominion railway.

The British North America Act of 1867, by s. 92, provides that in each province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects that are there enumerated, and among the classes that are enumerated are local works and undertakings, other than "such works as, although wholly situate within the province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the provinces."

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In 1888 the Railway Act of Canada was passed, and this contained certain provisions with regard to railways crossing other railways that were within the legislative authority of the Parliament of Canada. There are many sections in that statute to which reference would be needed if it were necessary to consider exactly the terms of s. 306 upon which the appellants rely, for it is quite true that, if a comparison be made between s. 306 and some of the other sections, a contrast will be found between the specific railways which are the subject of s. 306 and the general terms in which all railways are referred to in the other sections. This would become a very important matter if their Lordships thought it was essential to construe s. 306. But they do not think it is essential, for this reason, that even assuming in favour of the appellants that s. 306 did effect a declaration within the meaning of s. 92, sub-s. 10 (c), of the British North America Act, and thus place the railway within the authority of the Dominion and outside the authority of the province, yet none the less that statute has been in terms repealed, and if that repeal is effectual to change the status of the appellant company, then their railway is a Dominion railway no longer, and the Ontario Railway and Municipal Board had full jurisdiction to make the order which is the subject of the appeal.

The statute which effected this repeal was passed in 1903. The repealing section is s. 310, and that repealed in toto the previous statute, and by s. 7 a special declaration is made with regard to railways crossing other railways that were subject to the legislative authority of the Parliament of Canada. That section runs in these terms: "Every railway, steam, or electric street railway or tramway, the construction or operation of which is authorised by a special Act passed by the Legislature of any province now or hereafter connect-

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ing with or crossing a railway, which, at the time of such connection or crossing, is subject to the legislative authority of the Parliament of Canada is hereby declared to be a work for the general advantage of Canada, in respect only to such connection or crossing, or to through traffic thereon, or anything appertaining thereto. . . .”

The railway in question answers every one of the necessary conditions prescribed in the earlier part of s. 7. If, therefore, there was power left in the legislative authority of the Dominion of Canada to pass this Act, then it is obvious that, even assuming the railway had been placed within that authority by s. 306, it is there no longer, and there is no power within the Dominion to control its affairs. Their Lordships are clearly of opinion that s. 92, sub-s. 10, never intended that a declaration once made by the Parliament of Canada should be incapable of modification or repeal. To come to such a conclusion would result in the impossibility of the Dominion ever being able to repair the oversights by which, even with the greatest care, mistakes frequently creep into the clauses of Acts of Parliament. The declaration under s. 92, sub-s. 10 (c), is a declaration which can be varied by the same authority as that by which it was made. In the present case their Lordships see no reason to doubt that if the statute of 1888 effected such a declaration as to place the whole railway under Dominion control, that declaration has been properly and effectually varied, and the appellant company have ceased to be, even if they ever once were, under the control of the Dominion Board.

Other questions have been raised in the course of the argument, and notably one of great importance, with regard to the power of the Dominion Parliament to pass such a statute as that of 1888, on the hypothesis that s. 306 bore the meaning for which the appellants contend. This question is of great importance, but, for the reasons that have been given, its decision is unnecessary.

Their Lordships think that this appeal should be dismissed on the simple question which has already been stated.

Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for appellants: *Blake & Redden.*

Solicitors for respondent Attorney-General: *Freshfields.*

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INTERVENANTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Provincial Taxation—Assessment—Dominion Lands—Interest of Lessee—Validity—British North America Act, 1867 (30 Vict. c. 3), s. 125.

By the British North America Act, 1867, s. 125, "no lands or property belonging to Canada or any province shall be liable to taxation."

The appellant was assessed under Saskatchewan statutes, 6 Edw. 7, c. 36, and 7 Edw. 7, c. 3, and their amendments, in respect of Dominion land of which he held grazing leases from the Crown. Land is defined for the purpose of those statutes as including any estate or interest therein:—

Held, that the statutes could be read as imposing the tax upon the appellant's interest in the land, and should be so read in order to make them consistent with s. 125, above mentioned.

APPEAL from a judgment of the Supreme Court of Canada (March 23, 1914) affirming the judgment of the Supreme Court of Saskatchewan, en banc (July 9, 1913), which affirmed the judgment at the trial.

The appellant held from the Crown two leases of lands situated in the province of Saskatchewan, but vested in the Crown in the right of the Dominion. The leases conferred upon the appellant the exclusive right of grazing cattle upon the lands, and provided that he should not use the lands for any other purpose. Under statutes of the province the appellant was assessed in respect of the lands for 1909, 1910, and 1911, the assessments being made in part for local purposes and in part for the general purposes of the province. The statutes of the province under which the assessments were made for local purposes were the Local

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Improvements Act (c. 36 of 1906) as amended by c. 13 of 1908, c. 7 of 1908-1909, and R. S. Sask., 1909, c. 88; those under which the assessments for general purposes were made were the Supplementary Revenue Act (c. 3 of 1907) as amended by c. 9 of 1908, c. 6 of 1909, and R. S. Sask., 1909, c. 37. The taxes assessed under the latter set of Acts were to be assessed, collected, and enforced as though forming part of the taxes assessed under the Local Improvements Act, 1906. The definitions, amongst others, of "land," "owner," and "occupant" in that Act applied to all the above Acts. By the Local Improvements Act, 1906, s. 2, sub-s. 18, "land," "lands," or "real property" includes lands, tenements and hereditaments, and any estate or interest therein."

The respondent municipality, who were organized as a local improvement district under the Rural Municipality Act (R. S. Sask., 1909, c. 87), sued the appellant for the amounts assessed for 1909, 1910, and 1911. The appellant, among other defences not material to this report, contended that the assessments were ultra vires, having regard to s. 125 of the British North America Act, 1867, which provides: "No lands or property belonging to Canada or any province shall be liable to taxation."

The judge at the trial gave judgment for the plaintiffs. That judgment was affirmed by the Supreme Court of Saskatchewan en banc and by the Supreme Court of Canada (49 Can. S. C. R. 563). Upon the question of ultra vires the Courts in Canada considered that the case was governed by *Calgary and Edmonton Land Co. v. Attorney-General of Alberta*. (1)

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p. 571. *Hellmuth, K.C.*, for the appellant; *T. Mathew*, for the intervenant, the Attorney-General for Canada. By the terms of the Supplementary Revenue Act, 1909, s. 1, the tax is levied upon the land itself, and by s. 58 of the Local Improvements Act, 1906, it is made a special lien thereon; in default of payment the land may, under ss. 86 and 88 (the latter amended by c. 13 of 1908, s. 15), be vested in the Crown in the right of the province. The tax is therefore ultra vires under s. 125 of the British North America Act, 1867. Even if the tax is only upon the appellant's interest in the land, the statutory provisions interfere with the

(1) (1911) 45 Can. S. C. R. 170.

Dominion's administration of its Crown lands, since (1.) the leases provide that the lessee's interest shall not be assigned without leave, and (2.) upon an adjudication under s. 86 of the Act of 1906 the Dominion could only free the lands, under s. 87, by paying the tax and a redemption fee. In *Calgary and Edmonton Land Co. v. Attorney-General of Alberta* (1) the entire beneficial interest in the lands had passed to the person taxed.

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Sir R. Finlay, K.C., and Colclough, K.C., for the respondents, and for the intervenant, the Attorney-General for Saskatchewan. Having regard to the definition of "lands" in the Local Improvements Act, 1906, s. 2, the tax was assessed upon the appellant's interest in the lands, and not upon the lands themselves. Only that interest would become vested in the province upon an adjudication under s. 86 of that Act. If any of the provisions for enforcing the tax are repugnant to s. 125 of the British North America Act, 1867, those provisions are void, but under the Colonial Laws Validity Act, 1865, the rest of the Act is valid, and the liability of the appellant in the action is not affected.

Hellmuth, K.C., replied.

July 25. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. This appeal arises out of an action in which the appellant was held liable in the Courts below to pay a sum of 3118.78 dollars, being the amount assessed as tax upon certain lands in the province of Saskatchewan. The appellant's interest in these lands was conferred by leases from the Crown, granted to him by the Dominion Government, for grazing purposes. The lands were situated within a local improvement district, which was subsequently organized as a municipality under a statute of the province. The tax in question was assessed by this municipality, which was the plaintiff in the action and is the principal respondent on this appeal.

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The only question now raised is whether the appellant could be assessed for the tax, regard being had to s. 125 of the British North America Act, 1867, which provides that "no lands or property belonging to Canada or any province shall be liable to taxation."

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The province of Saskatchewan formed part of the North-West Territory. But it was not organized under s. 146 of the Act of 1867, which provides for the admission of that territory by address to the Crown. It was organized and admitted by an Act of the Dominion Parliament. This Act was itself passed under the powers conferred by the British North America Act, 1871, which enabled the Parliament of Canada to establish new provinces in any territories forming part of the Dominion, but not included in any of its provinces, and to make provision for the administration, peace, order, and good government of any such new province. The Act of the Dominion Parliament, passed in 1905 in regard to Saskatchewan under these provisions, was 4 & 5 Edw. 7, c. 42, and known as the Saskatchewan Act. This established the part of the North-West Territory to which it related as the province of Saskatchewan, and provided that the provisions of the British North America Acts, which, of course, included s. 125 of the Act of 1867 already referred to, should apply as if Saskatchewan had been an originally united province and set up a Constitution for the new province analogous to that of the other provinces. By s. 20 it was enacted that as the new province was not to have the public land as a source of revenue, Canada should make certain annual payments to it. By s. 21 the Crown lands were to continue to be vested in the Crown and to be administered by the Government of Canada for the purposes of Canada.

It is thus clear that the authorities of the province have no power to tax Crown lands, and the real question is whether this restriction prevents them from imposing the tax in controversy upon a tenant of Crown lands. The appellant was tenant of the parcels of land to which the taxation was directed under two leases from the Dominion Government, for terms of years determinable on notice, and with restrictions on assignment. The leases were granted for grazing purposes. The taxes in controversy were imposed under the provisions of certain statutes of the Legislature of Saskatchewan passed, as to some of them, for the purpose of facilitating local improvements, and as to some of them for general purposes of the province, and for enabling assessments to those purposes. Under these statutes districts are to be constituted with councils. The council is in each case empowered to impose a tax of restricted

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amount upon "every owner or occupant in the district for land owned or occupied by him." "Owner" is defined to include any person who has any right, title, or estate whatsoever, or any interest other than that of a mere occupant in any land. "Occupant" is to include the inhabitant occupier of any land, or, if there be no inhabitant occupier, the person entitled to the possession thereof, and the leaseholder or holder under agreement for sale, and any person having or enjoying in any way, or for any purpose whatsoever, the use of land. "Land" includes lands, tenements, and hereditaments, and any estate or interest therein. The secretary of every district is to make an annual return showing the lands on which the taxes have not been paid, and in case default is proved a judge of the Supreme Court may make an adjudication, the effect of which is to vest the land, but subject to redemption, in the Crown in right of the province.

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The appellant was duly assessed in respect of the land comprised in the two leases, and the question is whether the assessment was valid. It is contended for the appellant that the tax is sought to be imposed on the land itself, which belongs to the Crown in right of Canada, and not on any individual who is interested in it. For the respondents, on the other hand, it is argued that all that is taxed is the interest of the appellant as a tenant of the land and not the land itself as owned by the Crown.

Their Lordships have arrived at the conclusion that the Supreme Court of Canada were right in affirming the judgment of the Supreme Court of Saskatchewan, which adopted the latter of these contentions. Following their decision in the analogous case from Alberta of *Calgary and Edmonton Land Co. v. Attorney-General of Alberta* (1), where the scheme and definitions in the Local Improvement Act of that province were substantially the same as those in the present case, the Supreme Court of Canada held that the taxing statute of Saskatchewan must be read, in accordance with a well-known principle, as not applying to the Crown or its lands. But they thought that there was no reason why it should not be treated as applying to an interest acquired by a private person under a lease from the Crown. The definitions of "land," "owner," and "occupant" make it

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easy to interpret the expression "land" as excluding any interest which still remains in the Crown. Their Lordships agree with this reasoning. They are of opinion that, although the appellant is sought to be taxed in respect of his occupation of land the fee of which is in the Crown, the operation of the statute imposing the tax is limited to the appellant's own interest. It appears to them that not only can the statutes be read as meaning this, and no more than this, when they use the word "land," but that they ought to be so read in order to make them consistent with s. 125 of the British North America Act, 1867, and not a nullity.

Other points were argued in the Courts below, such as that the province has no power to attach to a person not domiciled within it a personal liability to pay taxes, and that the respondent municipality had not the right to collect the assessments in question, even if they were lawfully imposed. But these other points were not pressed on behalf of the appellant in the argument at their Lordships' Bar, and it is therefore not necessary to deal with them.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with one set of costs. The Attorney-General for the Dominion of Canada will bear his own costs.

Solicitors for appellant: *Blake & Redden*.

Solicitors for respondents: *Bischoff, Coxe, Bompas & Bischoff*.

Solicitors for intervenants: *Charles Russell & Co. and George Hamilton*.

[PRIVY COUNCIL.]

TRUSTEES OF THE ROMAN
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RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF ONTARIO,
APPELLATE DIVISION.

*Ontario—Separate Schools—Trustees—Act superseding Trustees—Invalidity—
Separate Schools Act, 1863 (26 Vict. c. 5, Upper Canada), s. 2—British
North America Act, 1867 (30 & 31 Vict. c. 3), s. 93, sub-s. 1.*

The appellants were elected under s. 2 of the Separate Schools Act, 1863 (26 Vict. c. 5, Upper Canada), by the supporters of the Roman Catholic separate schools in Ottawa to be the trustees for those schools, and had powers to manage them, subject to regulations. They refused to conduct the schools in accordance with regulations validly made by the Department of Education for the province, and failed to open the schools at the date appointed by law, and to provide or pay qualified teachers. The Legislature of Ontario thereupon passed an Act, 5 Geo. 5, c. 45, which, after reaffirming the regulations and the statutory duties of the appellants, provided by s. 3 that if in the opinion of the Minister of Education the appellant board should fail to comply with any of the provisions of the Act he should have power, with the approval of the Lieutenant-Governor in Council, to appoint a Commission and to vest in it all or any of the powers vested by statute in the board, and to suspend or withdraw all, or any part of, the rights and privileges of the Board until he should think proper.

The British North America Act, 1867, s. 93, enacts that for each province the Legislature may exclusively make laws in relation to education, but provides, by sub-s. 1, "nothing in any such laws shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the province at the Union":—

Held, that s. 3 of 5 Geo. 5, c. 45, above mentioned, was ultra vires and invalid under s. 93, sub-s. 1, of the British North America Act, 1867, since it prejudicially affected the right or privilege conferred by the Act of 1863 upon the supporters of the Roman Catholic separate schools in Ottawa (a section of a class of persons within the meaning of the sub-section) to elect trustees for the management of the schools.

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CONSOLIDATED APPEALS from a judgment of the Supreme Court of Ontario, Appellate Division (April 6, 1916), affirming the judgment of Meredith C.J.C.P. at the trial.

* *Present*: LORD BUCKMASTER L.C., VISCOUNT HALDANE, LORD ATKINSON, LORD SHAW OF DUMFERMLINE, and LORD PARMOOR.

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The Ottawa Separate Schools Commission was appointed under s. 3 of 5 Geo. 5, c. 45, referred to in the head-note, and under the circumstances therein mentioned.

The appellants brought two actions in the Supreme Court, the first against the respondents the Ottawa Corporation and the Commission for an injunction restraining the corporation from paying to the Commission the school rates which they had collected, and the second against the Quebec Bank and the Commission to restrain the bank from paying over moneys deposited in the names of the appellants. The appellants alleged that s. 3 of 5 Geo. 5, c. 45, was invalid and void under s. 93, sub-s. 1, of the British North America Act, 1867. The Commission by its defence pleaded that the statute was within the competence of the Legislature of Ontario. The respondents the Ottawa Corporation and the Quebec Bank submitted to the order of the Court.

The actions were consolidated and were heard by Meredith C.J.C.P. The learned judge dismissed the actions, and his decision was affirmed by the Appellate Division (Meredith C.J.O. and Garrow, Maclaren, Magee, and Hodgins JJ.A.). The proceedings are reported at 34 Ont. L. R. 624 and 36 Ont. L. R. 485.

The Attorney-General for Ontario received notice of the actions and was represented at the hearings.

1916. July 14, 17. *Sir J. Simon, K.C., Belcourt, K.C., and R. O. B. Lane*, for the appellants. Even if the regulations with which the appellants failed to comply were valid, s. 3 of 5 Geo. 5, c. 45, is ultra vires under s. 93, sub-s. 1, of the British North America Act, 1867. The section deprives the supporters of the Roman Catholic separate schools of their rights under the Separate Schools Act, 1863, to elect trustees, and does so for an indefinite period. Those persons are a class of persons within s. 93, sub-s. 1.

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Sir R. Finlay, K.C., and McGregor Young, K.C., for the Attorney-General for Ontario; *Tilley, K.C.*, for the respondent Commission. There is a large body of Roman Catholic children whose parents desire to obey the regulations, but the appellants have closed the schools. The right or privilege in the Roman Catholic ratepayers is to elect a board to administer the Act. If they persist in electing trustees who fail to carry out valid regulations they refuse

to exercise the privilege. The right to maintain separate schools is in abeyance owing to the action of the appellants; the Act complained of merely provides new machinery for the maintenance of the schools. The right of appeal to the Governor-General under s. 93, sub-s. 3, of the British North America Act, 1867, prevents a continuation of the Commission beyond such time as its existence is necessary. Moreover, it is the duty of the Minister under the section complained of to restore the appellants to their functions as soon as they are prepared to administer the law: *Julius v. Bishop of Oxford*. (1)

Sir J. Simon, K.C., in reply. Sect. 93, sub-s. 1, protects rights as to denominational schools, not merely as to denominational teaching. The powers of the trustees may be taken away altogether under the Act complained of; it is not material to the competency of the Act that the powers will be restored if the Minister acts properly or reasonably. [*Brophy v. Attorney-General of Manitoba* (2) was referred to.]

Hon. M. Macnaghten, for the respondents the Ottawa Corporation and the Quebec Bank.

Nov. 2. The judgment of their Lordships was delivered by

LORD BUCKMASTER L.C. The question raised in these consolidated appeals is whether s. 3 of 5 Geo. 5, c. 45 (1915), Ontario, is valid and within the competency of the provincial Legislature. The appellants contend that this section prejudicially affects certain rights and privileges with respect to denominational schools reserved under provision 1 of s. 93 of the British North America Act, 1867.

The preamble of the Act of 1915 recites that an action was then pending in the Supreme Court of Ontario between R. Mackell and others and the appellants. This action has now been finally decided adversely to the appellants. Their Lordships see no reason to anticipate that this judgment will not be accepted and obeyed. There is a further recital that the appellants have failed to open the schools under their charge at the time appointed by law, and to provide or pay qualified teachers for the said schools, and have

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(1) (1880) 5 App. Cas. 214,
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(2) [1895] A.C. 202, 214.

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threatened at different times to close the said schools and to dismiss the qualified teachers duly engaged for the same. So far as this appeal is concerned the accuracy of these recitals was not questioned by the counsel for the appellants. Sect. 1 of the Act does not come into question in this appeal; s. 2 is a declaration of the duties of the appellants. Sect. 3 is as follows: "If, in the opinion of the Minister of Education, the said board fails to comply with any of the provisions of this Act, he shall have power with the approval of the Lieutenant-Governor in Council—(a) To appoint a Commission of not less than three nor more than seven persons. (b) To vest in and confer upon any Commission so appointed all or any of the powers possessed by the board under statute or otherwise, including the right to deal with and administer the rights, properties, and assets of the board, and all such other powers as he may think proper and expedient to carry out the object and intent of this Act. (c) To suspend or withdraw all or any part of the rights, powers, and privileges of the board, and whenever he may think desirable to restore the whole or any part of the same, and to re-vest the same in the board. (d) To make such use or disposition of any legislative grant that would be payable to the said board on the warrant of any inspector for the use of the said schools, or any of them, as the Minister may in writing direct."

The acting Minister of Education expressed the opinion that the trustees had failed, and were failing, to comply with the provisions of the Act, and submitted the appointment of a Commission for the approval of the Lieutenant-Governor in Council. The respondent Commission was duly appointed under an Order in Council on July 25, 1915.

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The powers conferred on the Minister of Education in sub-ss. (b) and (c) of s. 3 are expressed in very wide terms. At the instance of the Minister, with the approval of the Lieutenant-Governor in Council, all or any part of the rights, powers, and privileges of the appellant board may be suspended or withdrawn without limitation in time, and only subject to restoration at the discretion of the Minister. The powers withdrawn from the appellant board may be vested in and conferred upon an appointed Commission, a nominated body, in the selection of which the ratepaying supporters of the Roman Catholic separate schools have no voice. There is no exception to the universality of the

extent to which all the rights, powers, and privileges of the appellant board may be suspended or withdrawn and vested in and conferred upon this nominated body. Is this legislation consistent with provision 1 of s. 93 of the British North America Act, 1867? Sect. 93 enacts that in and for each province the Legislature may exclusively make laws in relation to education, subject and according to certain specified provisions. This section has been recently under the consideration of their Lordships in the appeal of the appellant board against R. Mackell and others. (1) The effect of the section and of ss. 91 and 92 is to give an exclusive jurisdiction to the Legislature of each province to make laws in reference to education subject to the specified provisions. The Parliament of Canada has no jurisdiction in relation to education, except under the conditions in provision 4, which are not in question in this appeal. The rights or privileges reserved in provision 1 cannot be prejudicially affected without an Act of the Imperial Legislature.

There is no question that the impeached section of the Act of 1915 does authorize the Minister of Education to suspend or withdraw legal rights and privileges with respect to denominational schools. The case of the respondent commission is that the appellant board does not come within the category of "a class of persons" and that no right or privilege with respect to denominational schools, which the appellant board had by law in the province at the Union, has been prejudicially affected. It was argued that the protection given by provision 1 related to rights or privileges possessed by all the adherents of the Roman Catholic schools in the province, and that the appellant board only represented the minority of a larger class. The status of the appellant board depends on the provisions contained in the Separate Schools Act, 1863. Sect. 2 of that Act confers the right of electing trustees for the management of a separate school for Roman Catholics, not on all the adherents of Roman Catholic schools in the province, but on any number of persons, not less than five, being heads of families and freeholders, and householders, resident within any school section of any township or corporate village or town, or within any ward of any city or town, and being Roman

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(1) See ante, p. 62. (A.C.)

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Catholics. The right of electing managers is thus conferred on the supporters of a separate school or schools for Roman Catholics within one or other of the designated areas. In the present case the appellant board are the elected trustees for the management of Roman Catholic separate schools within the city of Ottawa. They represent the supporters of the Roman Catholic separate schools within the area of the city, and as such elected trustees enjoy the right of management which was conferred under the Separate Schools Act, 1863. Apart therefore from any words of limitation or any implication to be drawn from the context, the appellant board represent a section of the class of persons who are within the protection of provision 1. Their Lordships can find neither limiting words nor anything in the context which would imply that they are excluded from the benefit of the provision. They are not the less within the provision that any other board similarly constituted would have similar rights and privileges. They would be entitled to the protection of the provision, though they were the only board of trustees in the province constituted under the Separate Schools Act, 1863. But if the appellant board represent people who come within the protection of provision 1, it is difficult to appreciate the argument that no legal right or privilege existing in the province at the Union with respect to denominational schools has been prejudicially affected. It is possible that an interference with a legal right or privilege may not in all cases imply that such right or privilege has been prejudicially affected. It is not necessary to consider such a possibility, and this question does not arise for decision in the appeal. The case before their Lordships is not that of a mere interference with a right or privilege, but of a provision which enables it to be withdrawn in toto for an indefinite time. Their Lordships have no doubt that the power so given would be exercised with wisdom and moderation, but it is the creation of the power and not its exercise that is subject to objection, and the objection would not be removed even though the powers conferred were never exercised at all. To give authority to withdraw a right or privilege under these conditions necessarily operates to the prejudice of the class of persons affected by the withdrawal. Whether or not a different policy might have been preferable, either in the opinion of the provincial Legislature or in that

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of the Courts, is not relevant consideration. It was argued that no evidence on behalf of the appellant board had been called to prove that the withdrawal of their rights, powers, and privileges operated to their prejudice. In the opinion of their Lordships no such evidence was necessary.

For the purpose of these appeals it is unnecessary to say more. The decision depends on a question of construction. During the argument the counsel for the respondent Commission pressed on their Lordships the difficulty of providing any adequate alternative in order to ensure the proper education of the children of Roman Catholic parents in the city of Ottawa. Their Lordships realize the great importance of this consideration, and there is no doubt that considerable temporary inconvenience must be involved if the appellant board, as representatives of the supporters of the Roman Catholic separate schools in Ottawa, fail to open the schools under their charge at the time appointed by law, and to provide and pay qualified teachers. It may be pointed out, however, that the decision in this appeal in no way affects the principle of compulsory free primary education in the province established under the Common Schools Act, 1859, and that if the appellant board and their supporters fail to observe the duties incident to the rights and privileges created in their favour the result is that the children of Roman Catholic parents are under obligation to attend the common schools, and thus lose the privileges intended to be reserved in their favour under provision 1 of s. 93 of the British North America Act, 1867. The history of this question is thus accurately summarized in the judgment of Meredith C.J.O.: "The ground upon which was based the claim of the Roman Catholics to separate schools was the injustice of compelling them to contribute to the support of schools to which, owing to the character of the instruction given in them, they could not for conscientious reasons send their children because in their view it was essential to the welfare and proper education of their children that religious instruction according to the tenets of the Roman Catholic Church should be imparted to them as part of their educational training. This injustice, it was claimed, was greatly aggravated when, by the School Law of 1859, a system of compulsory free primary education

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in schools supported partly by Government grants, but mainly by taxation, to which all ratepayers were liable, was established."

Their Lordships do not anticipate that the appellants will fail to obey the law now that it has been finally determined. They cannot, however, assent to the proposition that the appellant board are not liable to process if they refuse to perform their statutory obligations, or that in this respect they are in a different position from other boards or bodies of trustees entrusted with the performance of public duties which they fail or decline to perform.

From what has been said it appears that in their Lordships' view the Act as framed is ultra vires, and accordingly liberty will be reserved to the plaintiffs, should occasion rise, to apply to the Supreme Court of Ontario for relief in accordance with this declaration, but their Lordships do not anticipate that it will be necessary for the plaintiffs to avail themselves of this right.

Their Lordships will humbly advise His Majesty that the appeals be allowed with costs to be paid by the respondent Commission here and below, and the respondent commission will pay the costs of the corporation of the city of Ottawa and of the Quebec Bank.

Solicitors for appellants: *Harrison, Powell & Tulk.*

Solicitors for respondents: *Lawrence Jones & Co.*

Solicitors for the Attorney-General for Ontario: *Freshfields.*

[PRIVY COUNCIL.]

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MACKELL AND OTHERS.....RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF ONTARIO,
APPELLATE DIVISION.

Ontario—Separate Schools—English-French Schools—Restriction of Use of French—Validity—British North America Act, 1867 (30 & 31 Vict. c. 3), s. 93, sub-s. 1—Common Schools Act, 1859 (22 Vict. c. 64), s. 79, sub-s. 8.

In Ontario there are two classes of free primary schools, namely, public schools and separate schools, the latter being denominational schools established under the Separate Schools Act, 1863 (26 Vict. c. 5, Upper Canada). The appellants were the elected trustees of the Roman Catholic separate schools in Ottawa, and under the above Act had power to determine the "kind and description" of separate schools to be established therein and power to manage them. In 1913 the Department of Education for the province, under provincial statutory powers to make regulations, issued a regulation restricting the use of French in schools, whether public or separate, in which French was a language of instruction and communication.

Sect. 93 of the British North America Act, 1867, enacts that for each province the Legislature may exclusively make laws in relation to education, but by sub-s. 1 provides that "nothing in any such laws shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have in the province at the Union." The appellants contended that the regulation was invalid under the above sub-section and was not binding upon them:—

Held, (1.) that the class of persons for whom the protection of the sub-section is claimed must be a class determined by religious belief and not by race or language; (2.) that the power of the appellants as trustees to determine the "kind and description" of schools did not extend to determining whether English or French should be the language of instruction; (3.) that the regulation did not prejudicially affect any right or privilege secured by law at the Union to Roman Catholics in the province, and that it was consequently valid and binding upon the appellants.

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APPEAL from a judgment of the Supreme Court of Ontario, Appellate Division (July 12, 1915), affirming the judgment of Lennox J. at the trial.

* *Present*: LORD BUCKMASTER L.C., VISCOUNT HALDANE, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD PARMOOR.

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The appellants were the duly elected trustees of the Roman Catholic separate schools established and maintained in Ottawa under the Separate Schools Act, 1863 (26 Vict. c. 5, Upper Canada).

The respondents, who sued on behalf of themselves and all other supporters of the above-mentioned schools, brought an action in the Supreme Court of Ontario praying for a mandatory order against the appellants to conform to and enforce, in the schools under their control, certain regulations made by the Department of Education for that province. The appellants by their defence alleged that the regulations referred to were ultra vires and in violation of s. 93, sub-s. 1, of the British North America Act, 1867, which is set out in the head-note. The regulation more particularly in question, and which alone was the subject of the present appeal, was regulation 17 contained in a Circular of Instructions issued by the Department on August 17, 1913.

By the Common Schools Act, 1859 (22 Vict. c. 64, Upper Canada), common schools, now called public schools, were established for free primary education in the province. By the Separate Schools Act, 1863 (26 Vict. c. 5, Upper Canada), Roman Catholics in the province were given the right to establish separate schools, Roman Catholic ratepayers being allowed to have the school rates which they paid allocated to those schools. Under s. 7 of the latter Act the elected trustees of separate schools had in relation thereto the powers of management and control given to the trustees of common schools by the Common Schools Act, 1859. Both classes of schools were attended by children some of whom spoke English, some French, and some both languages.

The Department of Education, as successors to the Council of Public Instruction, had power to make regulations for common schools under s. 119, sub-s. 4, of the Act of 1859, and for separate schools under s. 26 of the Act of 1863.

The material part of regulation 17 of 1913, which is set out in full at 32 Ont. L. R. 252, was to the following effect. Clause 1 stated that for convenience of reference the term English-French was applied to those schools, whether public or separate, in which French was a language of instruction and communication, and which should be annually designated by the Minister of Education. By

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clause 2, the courses of study prescribed for public schools, except as to religious teaching and allowing separate schools to use Roman Catholic readers, were to be in force in English-French schools. By clause 3, in both public and separate schools, the use of French was not to be continued beyond the first (i.e., the lowest) form, except upon the approval of the chief inspector. By clause 4, French was preserved as a subject of study, provided that it did not interfere with the adequacy of the instruction in English. Clause 5 provided for the inspection of English-French schools, the inspectors being required (clause 10) to report if any regulation was not properly carried out. Clause 13 required that teachers in English-French schools should possess a knowledge of English sufficient to teach the prescribed courses of study.

On April 29, 1914, Falconbridge C.J.K.B. made a mandatory order against the appellants to conform to and enforce the regulations in all the schools under their control. Upon the appellants failing upon September 1, 1914, to open the schools according to law, Lennox J. ordered them to do so; they did not comply with that order. The action was tried by Lennox J. The learned judge (whose judgment is reported at 32 Ont. L. R. 245) declared, *inter alia*, that the regulations in question were *intra vires* and made the injunction perpetual, subject to such order as the Court might see fit to make, upon it being shown that the appellants intended to conduct the schools according to law.

On appeal to the Appellate Division (Meredith C.J.O. and Garrow, Maclaren, Magee, and Hodgins JJ.A.) the judgment was affirmed. The appeal is reported at 34 Ont. L. R. 335.

The Attorney-General for Ontario was given notice of the proceedings and was represented at the hearings.

1916. July 7, 10, 11, 13, 14. *Sir J. Simon, K.C.*, and *Belcourt, K.C.*, for the appellants. Sect. 93, sub-s. 1, of the British North America Act, 1867, protects all the then existing rights and privileges of denominational schools, not only rights and privileges as to denominational teaching. The French-Canadian supporters of the separate schools are a "class of persons" within the meaning of the sub-section. Under s. 7 of the Separate Schools Act, 1863, the appellants had in relation to the schools the powers of trustees of

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common schools. They consequently had, under the Common Schools Act, 1859, power (s. 61) to appoint local superintendents, and (s. 79) to determine the "kind and description" of schools to be established, also powers to manage the schools and to select qualified teachers. The right to determine the "kind and description" of schools includes the right to determine whether English or French should be the language of instruction in any particular school. The rights referred to were vested by law in the trustees at the Union as representatives of a class of persons within s. 93, sub-s. 1, and they are prejudicially affected by regulation 17. The sub-section ensures to the trustees of separate schools the rights which trustees of common schools had in 1867 without any modification which might subsequently take place. Even if the sub-section protects only rights and privileges in relation to religious or denominational teaching, a regulation which alters the language in which a child has hitherto received that teaching is prejudicial thereto. The decisions of the Board in *City of Winnipeg v. Barrett*(1) and *Brophy v. Attorney-General of Manitoba*(2) are not applicable; there was in 1867 no legislative provision for Roman Catholic schools in Manitoba and consequently no existing rights by law. [Reference was also made to *Maher v. Town of Portland* (3); Keith's Responsible Government in the Dominions, vol. 2, pp. 691 et seq.; *McDonald v. Lancaster Separate School Trustees* (4); both the Common Schools Act, 1859, and the Separate Schools Act, 1863, generally; and to the Public Schools Act (R. S. Ont., 1914, c. 266), s. 84(b).]

Tilley, K.C., for the respondents; *Sir R. Finlay, K.C.*, and *McGregor Young, K.C.*, for the Attorney-General for Ontario. The decisions of the Board referred to for the appellants show that the only rights and privileges protected by s. 93, sub-s. 1, are those which any class of persons had (a) by law, (b) at the Union, (c) in relation to denominational schools. It is the right to maintain the denominational character of the schools which is protected, not the trustees' mode of conducting the schools; a power to make regulations is expressly given by s. 26 of the Separate Schools Act, 1863. There was at the Union no legal right or privilege to use the

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(1) [1892] A.C. 445.
(2) [1895] A.C. 202.

(3) P.C. (1873) Wheeler's
Confederation Law of
Canada, p. 362.
(4) (1915) 34 Ont. L.R. 346.

French language in any denominational school. The power to determine the "kind or description" of school relates to the grade of school to be established, that is, to choose from the kind of schools allowed according to the "classification" made under s. 119, sub-s. 4. It cannot have been intended that the language question should be subject to the varying policy of successive boards annually elected. The trustees of separate schools have no power to elect local superintendents; this is made clear by ss. 23, 26, and 27 of the Act of 1863. The French-Canadian supporters are not a class of persons within the meaning of s. 93, sub-s. 1, of the British North America Act; the sub-section connotes a class recognized by legislation. The class here to be considered is the Roman Catholic ratepayers of the province; no prejudice to any right which they had is shown. A right or privilege is something enjoyed independently of the rest of the public: *Fearon v. Mitchell* (1); the regulation, however, applies to both public and separate schools, and clause 2 expressly protects the rights as to religious teaching. The appellants had a right of appeal against the regulation to the Governor-General in Council under s. 93, sub-s. 3, of the British North America Act, 1867.

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Sir J. Simon, K.C., in reply. The power of the Department to make regulations under s. 26 of the Act of 1863 is subject to the protection given by s. 93, sub-s. 1.

Nov. 2. The judgment of their Lordships was delivered by

LORD BUCKMASTER L.C. This appeal raises an important question as to the validity of a Circular of Instructions issued by the Department of Education for the Province of Ontario on August 17, 1913.

The primary schools within the province are for the purposes of this circular separated into two divisions, public schools and separate schools, the latter, with which alone this appeal is concerned, being denominational schools, established, supported, and managed under certain statutory provisions to which reference will be made. The population of the province is, and has always been, composed both of English and of French-speaking inhabitants, and each of the two classes of schools is attended by children who speak some one language, some the other, while some, again, have

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the good fortune to speak both, so that distinction in language does not and cannot be made to follow the distinction in the schools themselves. The circular in some of its clauses deals with all schools, but its heading refers only to English-French schools, which it defines as being those schools, whether separate or public, where French is a language of instruction or communication, which have been marked out by the Minister for inspection as provided in the circular.

The object of the circular is to restrict the use of French in these schools, and to this restriction the appellants, who are the Board of Trustees of the Roman Catholic Separate Schools of the city of Ottawa, assert that they are not obliged to submit. The respondents, who are supporters of the same Roman Catholic schools, desire to maintain the Circular of Instructions in its integrity, and upon the appellants' refusal to abide by its terms the respondents instituted against them the proceedings out of which this appeal has arisen, asking, among other things, a mandatory order enforcing against the appellants obedience to the circular.

The Supreme Court of Ontario granted the injunction that was sought, and their judgment was affirmed by the unanimous opinion of the judges of the Appellate Division of the Supreme Court.

The appellants' defence to the action rests in substance upon the contention that the instructions were, and are, wholly unauthorized and unwarranted and beyond the powers of the Minister of Education because they were contrary to, and in violation of, the British North America Act, 1867.

In order to confer legislative authority upon the instructions an Act of the Province of Ontario (5 Geo. 5, c. 45) has been passed during the litigation declaring that the regulations imposed were duly made and approved under the authority of the Department of Education and became binding according to the terms of their provisions on the appellants and the schools under their control, and containing consequential provisions. It is obvious that the validity of this statute depends upon considerations similar to those involved in determining the validity of the instructions, but

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the statute is the subject of another proceeding(1), and the present appeal is confined to the question whether the Minister of Education had power to issue the circular. The number of schools which are affected by the dispute is considerable, for of 192 Roman Catholic schools under the charge of the appellants 116 have been designated English-French schools.

The material sections in the British North America Act upon which the appellants rely are ss. 91, 92, and 93. Sect. 91 authorizes the Parliament of Canada to make laws for the peace, order, and good government of Canada in relation to all matters not coming within the classes of subjects by the Act assigned exclusively to the Legislatures of the provinces. Sect. 92 enumerates the classes of subjects in relation to which the Legislatures of the provinces may exclusively make laws, and includes therein generally all matters of a merely local or private nature in the province. Sect. 93 deals specifically with education, and enacts that in and for each province the Legislature may exclusively make laws in relation to education, subject and according to the provisions therein contained. It appears, therefore, that the subject of education is excluded from the powers conferred on the Parliament of Canada, and is placed wholly within the competence of the provincial Legislatures, who again are subject to limitations expressed in four provisions. Provision 1 is in these terms: "Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the province at the Union."

Provision 3 contains an important safeguard, which gives an appeal to the Governor-General in Council from any act or decision of any provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the King's subjects in relation to education. Provision 4 provides machinery for making the decision of the Governor-General in Council effective. If a provincial law which seems to the Governor-General in Council requisite for the due execution of the provisions of the section is not made, or any decision of the Governor-General in Council is not duly executed by the proper provincial authority, then and in every such case, and so far only as

(1) See p. 76, post. (A.C.)

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the circumstances of each case require, the Parliament of Canada may make remedial laws for the due execution of the provisions of this section, and of any decision of the Governor-General in Council under the section. These provisions contain a procedure of great value to the Protestant or Roman Catholic minority in relation to education. They do not affect or diminish whatever remedy the appellants have under provision 1, and cannot operate to give the Legislature of Ontario authority to legislate in matters specially excepted from their authority. Accordingly it would require an Act of the Imperial Legislature prejudicially to affect any right or privilege reserved under provision 1, and if the regulations which are impeached do prejudicially affect any such right or privilege, to that extent they are not binding on the appellants.

There is no question that the English-French Roman Catholic separate schools in Ottawa are denominational schools to which the provision applies, and it has been decided by this Board that the right or privilege reserved in the provision is a legal right or privilege, and does not include any practice, instruction, or privilege of a voluntary character which at the date of the passing of the Act might be in operation: *City of Winnipeg v. Barrett*.⁽¹⁾ Further, the class of persons to whom the right or privilege is reserved must, in their Lordships' opinion, be a class of persons determined according to religious belief, and not according to race or language. In relation to denominational teaching, Roman Catholics together form within the meaning of the section a class of persons, and that class cannot be subdivided into other classes by considerations of the language of the people by whom that faith is held. The appellants and the respondents, therefore, are members of the same class; but this fact does not affect the appellants' position on their appeal, for their case is that even to the class so determined there were preserved by the statute and vested in them as trustees rights or privileges which include the right of deciding as to the language to be used as a means of instruction; and the question, therefore, that arises is, What were the rights and privileges that were protected by the Act, and were they invaded by the circular according to its true meaning?

(1) [1892] A. C. 445.

Now it appears that at the date of the passing of the British North America Act, 1867, a statute was in operation in Upper Canada by which certain legal rights and privileges were conferred on Roman Catholics in Upper Canada in respect to separate schools, and so far as the facts of this case are concerned this was the only source from which the rights and privileges could have proceeded.

This Act (1) enabled any number of people, not less than five and being Roman Catholics, to convene a public meeting of persons who desire to establish a separate school for Roman Catholics, and for the election of trustees for the management of such schools; by s. 7 it is enacted that the trustees of such schools should form a body corporate under the statute, should have power to impose, levy, and collect school rates or subscriptions from persons sending children to, or subscribing towards the support of, such schools, and should have "all the powers in respect of separate schools that the trustees of common schools have and possess under the provisions of the Act relating to common schools." A special clause also related to the appointment of teachers, who, before the passing of this statute, had been arbitrarily appointed by boards of trustees, and this power was regulated and restricted by s. 13, which provided that the teachers of the separate schools should be subject to the same examinations and receive their certificate of qualification in the same manner as common school teachers; while s. 26 provided that the schools should be subject to inspection, and should be subject also "to such regulations as may be imposed from time to time by the Council of Public Instruction for Upper Canada."

In order, therefore, to ascertain the true extent and limit of the powers conferred by this statute it is necessary to see what were the powers enjoyed by trustees of the common schools. These are to be found in another statute of Upper Canada, 22 Vict. c. 64, known as the Common Schools Act, 1859. This statute conferred upon trustees for common schools (now called public schools) certain powers, the most important of which are to be found collected under several heads in s. 79. A mere glance at this section will show that such powers are undoubtedly wide. They include under sub-s. 7 power to acquire school

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(1) Separate Schools Act, 1863 (26 Vict. c. 5, Upper Canada).

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sites and premises, and to do what may seem right for procuring text-books and establishing school libraries, while sub-s. 8 places in the hands of the trustees the determination of "the kind and description of schools to be established," the teachers to be employed, and generally the terms of their employment. These powers are, however, to some extent limited by sub-ss. 15 and 16, the first of which in effect requires that the text-books should be a uniform series of authorized text-books, while the latter compels the trustees to see that all the schools under their charge are conducted according to the authorized regulations.

Counsel for the appellants naturally place great reliance upon these provisions, and in the wider aspect of their argument they contend that "the kind of school" that the trustees are authorized to provide is a school where education is to be given in such language as the trustees think fit. They urge that it was a right or privilege possessed with respect to denominational schools in 1867 in determining the number and kind of schools to say within what limits the French language is to be used; for, according to their contention, "kind of school" means a school where the French language, under the direction of trustees, may be used as a medium of instruction on terms not less favourable than the use of English. Their Lordships are unable to agree with this view. The "kind" of school referred to in sub-s. 8 of s. 79 is, in their opinion, the grade or character of school, for example, "a girls' school," "a boys' school," or "an infants' school," and a "kind" of school, within the meaning of that subsection, is not a school where any special language is in common use.

The schools must be conducted in accordance with the regulations, and their Lordships can find nothing in the statute to take away from the authority that had power to issue regulations the power of directing in what language education is to be given. If, therefore, the trustees of the common schools would be bound to obey a regulation which directed that education should, subject to certain restrictions, be given in either English or French, the trustees of the separate schools would also be bound to obey a regulation of the same character affecting their school, provided that it does not interfere with a right or privilege reserved under the Act of 1867, i.e., a right or privilege attached to denominational teaching.

The objections to the instructions which were urged before their Lordships, however, were not chiefly based on the allegation that they prejudicially affected in any special manner denominational teaching, but on the wider ground. Their Lordships appreciate the affection which the French-speaking residents in Ottawa feel for the French language; but it must not be forgotten that, although a majority of the supporters of the English-French separate schools in Ottawa are of French origin, there are other supporters to whom French is not the natural language. This fact has no doubt caused great difficulty in adjusting fairly as between the different inhabitants the natural rivalry as to the languages to be used in the education of the children, and the care with which this difficulty has been considered is evidenced in the terms of a valuable report which is printed in the record and to which their Lordships would direct attention: "As was stated in our former report, while all classes of the French people are not only willing but desirous that their children should learn the English language, they at the same time wish them to retain the use of their own language, and there is no reason why they should not do so. To possess the knowledge of both languages is an advantage to them. And the use of the English language instead of their own, if such a change should ever take place, must be brought about by the operation of the same influences which are making it all over this continent the language of other nationalities as tenacious of their native tongue as the French. It is a change that cannot be forced. To attempt to deprive a people of the use of their native tongue would be as unwise as it would be unjust, even if it were possible. In the British Empire there are people of many languages. The use of these does not affect the loyalty of the people to the Crown, and the English language remains the language of the Empire. The object of these schools is to make better scholars of the rising generation of French children, and to enable them to do better for themselves by teaching them English, while leaving them free to make such use of their own language as they please."

It therefore becomes necessary to examine closely the terms of the circular in order to ascertain the nature and extent of the restrictions it imposes. Unfortunately it is couched in obscure language, and it is not easy to ascertain

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its true effect. It opens with a definition of English-French schools, and it was argued on behalf of the appellants that even this definition was not within the power of the Department; but there is no weight in this objection, provided that the selected schools are so dealt with as not to impeach any legal right or privilege of the appellants. The second paragraph of the circular is important. The regulations and courses of study prescribed for the public schools, which are not inconsistent with the provisions of the circular, are applied to the English-French schools, with the following modifications: "The provision for religious instruction and exercises in public schools shall not apply to separate schools, and separate school boards may substitute the Canadian Catholic readers for the Ontario public school readers."

These modifications bring the instructions into agreement with the provisions as to regulations affecting religious instruction in the Common Schools Act and the Separate Schools Act. The only reference to religious instruction to which their Lordships were referred in these statutes is s. 129 of the former statute. This section provides that no person shall require any pupil to read or study in or from any religious book or join in any exercise of devotion or religion objected to by his or her parents or guardian, and this provision preserves these rights. Indeed the clause, in their Lordships' opinion, indicates that the whole course of religious teaching in the separate schools is outside the operation of the circular, for the circular applies to public schools and separate schools alike and impartially, and if it contained provisions with regard to religious instruction in the public schools, by virtue of this clause those provisions would not apply to the separate schools; throughout the whole of the circular, however, there is nothing whatever to indicate that it is intended to have any application, excepting it may be in the case of public schools, to anything but secular teaching, and it is in this connection that clause 3 must be read. This is the clause which regulates the use of French as the language of instruction and communication, and it is against these provisions that the complaint of the appellants is mainly directed. The clause refers equally to public and separate schools, and directs that modifications shall be made in the course of study in both classes of schools, subject to the direction and approval of

the chief inspector. In the case of French-speaking pupils, French, where necessary, may be used as the language of instruction and communication, but not beyond Form I., except on the approval of the chief inspector in the case of pupils beyond Form I. who are unable to speak and understand the English language. There are further provisions for a special course in English for French-speaking pupils, and for French as a subject of study in public and separate schools.

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Mr. Belcourt urged that so to regulate use of the French language in the separate Roman Catholic schools in Ottawa constituted an interference, and is in some way inconsistent with a natural right vested in the French-speaking population; but unless this right was one of those reserved by the Act of 1867, such interference could not be resisted, and their Lordships have already expressed the view that people joined together by the union of language and not by the ties of faith do not form a class of persons within the meaning of the Act. If the other opinion were adopted, there appears to be no reason why a similar claim should not be made on behalf of the English-speaking parents whose children are being educated in the Roman Catholic separate schools in Ottawa. In this connection it is worthy of notice that the only section in the British North America Act, 1867, which relates to the use of the English and French languages (s. 133) does not relate to education, and is directed to an entirely different subject-matter. It authorizes the use of either the English or French language in debates in the Houses of Parliament in Canada and the Houses of Legislature in Quebec, and by any person, or in any pleading or process in, or issuing from, any Court of Canada, and in and from all or any of the Courts of Quebec. If any inference is to be drawn from this section, it would not be in favour of the contention of the appellants.

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Further objections that are taken to the circular depend upon these considerations, that it interferes with the right to manage which the trustees possess, and that it further infringes a right on the part of the trustees to appoint teachers whose certificates are provided by a board of whom the trustees can appoint one.

In their Lordships' view there is no substance in either of these contentions. The right to manage does not involve the right of determining the language to be used in the

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schools. Indeed, the right to manage must be subject to the regulations under which all the schools must be carried on; and there is nothing in the Act to negative the view that those regulations might include the provisions to which the appellants object. If, therefore, the regulation as to which the trustees of the common schools were bound to carry on the class of school committed to their charge did in fact, under the Act of 1859, enable directions to be given as to the medium of instruction, the power possessed by the trustees of the separate schools would have been subject to the same limitation, and the question as to interference with the powers of management does not arise as an independent question.

So far as the teachers are concerned, the words of sub-s. 8 of s. 79 empower the trustees to determine the teacher or teachers; but this merely means that they are to be determined out of the number who are duly qualified, and it is for the Board of Education to impose what conditions they think fit as to the necessary qualification of such a teacher. Under the statute of 1859 the body for examining and giving certificates of qualification for the teacher was constituted by three members of the Board of Public Instruction, including a local superintendent of the schools; and it is argued that, under the power of appointing the local superintendent—a power conferred on the trustees—the provisions in the circular, which impose as a necessary condition of qualification of the teachers that they must possess a knowledge of the English language, interfered with the trustees' right in this respect. To accede to this argument would involve the removal of the condition as to the necessary qualification of the teachers from the Board of Education. This might be a serious matter for the cause of education in the Province of Ontario; but there is no need to consider that the statute compels this view. Even assuming that the provision of s. 96 as to the granting of certificates to teachers might be still revived, yet even then there is nothing to prevent the establishment of special conditions as conditions with which the teachers must comply before any such certificate can be given.

In the result, their Lordships are of opinion that, on the construction of the Acts and documents before them, the regulations impeached were duly made and approved under the authority of the Department of Education and became

binding according to the terms of those provisions on the appellants and the schools under their control, and they will humbly advise His Majesty to dismiss this appeal. The appellants will pay the costs.

Solicitors for appellants: *Harrison, Powell & Tulk.*

Solicitors for respondents: *Lawrence Jones & Co.*

Solicitors for the Attorney-General for Ontario: *Freshfields.*

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| ATTORNEY-GENERAL FOR THE DOMINION OF CANADA AND OTHERS..... | } | APPELLANTS; |
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AND

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| RITCHIE CONTRACTING AND SUPPLY COMPANY, LIMITED, AND OTHERS..... | } | RESPONDENTS. |
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ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Vesting of Territory—"Public Harbour"—British North America Act, 1867 (30 & 31 Vict. c. 3), s. 108.

By s. 108 of the British North America Act, 1867, "the public works and property of each Province, enumerated in the third schedule of this Act, shall be the property of Canada." The schedule includes "public harbours."

"Public harbour," in the above connection, means not merely a place suited by its physical characteristics for use as a harbour, but a place to which on the relevant date the public had access as a harbour, and which they had actually used for that purpose. The date at which the test must be made is the date at which the British North America Act, by becoming applicable, effected a division of the assets between the Province and the Dominion; that date being, in the case of British Columbia, 1871:—

Held, upon the evidence and applying the above test, that English Bay in the province of British Columbia is not a "public harbour," and accordingly is not the property of the Dominion.

Judgment of the Supreme Court of Canada affirmed.

APPEAL from a judgment of the Supreme Court of Canada (November 2, 1915) affirming a judgment of the Court of Appeal of British Columbia (November 3, 1914), which affirmed the judgment of Macdonald J. at the trial.

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The questions raised by the action were whether English Bay, in the neighbourhood of the city of Vancouver, British Columbia, was a "public harbour" so as to be the property of the Dominion of Canada under s. 108 of the British North America Act, 1867, and Sched. 3 (ii) thereto; and, if so, whether a bank on the foreshore, known as Spanish Bank, formed part of the harbour. A further claim was put forward by the plaintiff, the Attorney-General, by an amendment based upon s. 91, head 10 of the Act. The circumstances in which the questions arose appear from the judgment of their Lordships.

**Present*: VISCOUNT HALDANE, LORD BUCKMASTER, and LORD DUNEDIN.

The appeal to the Supreme Court of Canada is reported at 52 Can. S.C.R. 78.

1919. July 21. *Sir John Simon K.C.* and *Newcombe K.C.* for the appellants. English Bay is a "public harbour" within the meaning of sched. 3 referred to in s. 108 of the British North America Act, 1867, and Spanish Bank forms part of it. The word "public" merely excludes harbours to which the public has no access. The word "harbours" signifies places of shelter and is to be distinguished from "ports"; it is not material whether there has been an expenditure of money, nor whether commercial use is made of the harbour. "The Vancouver Island Pilot," compiled from reports made by naval officers in 1858 and 1864, and published by the Admiralty, shows that the physical characteristics of English Bay constituted it a safe anchorage and harbour; and the evidence shows that it was so used before 1871. A broad interpretation should be given to the words "public harbours," and if there is a doubt the decision should be in favour of the Dominion. [Reference was made to *Holman v. Green* (1), *Attorney-General for the Dominion of Canada v. Attorneys-General for the Provinces* (known as the first *Fisheries Case*) (2) *Kennelly v. Dominion Coal Co.* (3), *Attorney-General of Canada v. Kelfer* (4), and *Attorney-General for British Columbia v. Canadian Pacific Ry. Co.* (5)] Further, "navigation and shipping" being a subject entrusted to the Dominion by s. 91, head 10, the Government was entitled and bound to prevent dredging operations which were calculated to affect navigation.

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Farris K.C. (Attorney-General for British Columbia), *Geoffrey Lawrence* and *O. C. Bass* for the respondents, were not called upon.

July 31. The judgment of their Lordships was delivered by

LORD DUNEDIN. The respondents, the Ritchie Contracting and Supply Company, were, with the licence of the Government of British Columbia, whose Attorney-General is the second respondent, removing sand from a bank on the foreshore of the sea known as Spanish Bank, situated at the entrance to English Bay. English Bay is the bay which

(1) [1881] 6 Can. S.C.R. 707.

(4) (1889) 1 Brit. Col. Rep. 368

(2) [1898] A.C. 700.

(5) [1906] A.C. 204, 209.

(3) (1904) 36 Nova Scotia Rep. 495, 500.

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forms the outer approach to Burrard Inlet, which leads to the city of Vancouver. The appellants, the Attorney-General for the Dominion of Canada and the Vancouver Harbour Commissioners, brought this action to restrain the respondents from removing the sand. The main ground on which the action was based was that English Bay was a public harbour and Spanish Bank a part thereof; that in virtue of s. 108 of the British North America Act the solum of the bank belonged to the Dominion; and that the operations of the respondents thereon were consequently unauthorized and illegal. There was a second and subsidiary ground of action which will be more particularly specified hereafter.

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The case was tried before Macdonald, J. who decided against the appellants and dismissed the action. Appeal being taken to the Court of Appeal of British Columbia, that judgment was affirmed unanimously by five judges. Appeal again being taken to the Supreme Court of Canada, the judgment was again affirmed unanimously by six judges. The appellants have, therefore, a most formidable weight of judicial opinion against them; but on appeal to this Board they contended that, although all the judges were against them, the grounds of judgment of various of the learned judges were different, and that the unanimity was more apparent than real. There are cases where opinions which agree in result yet differ so in substance as to be incapable, so to speak, of living together. On the other hand, if a plaintiff to obtain the relief he asks must prove affirmatively two or more propositions, it follows that a learned judge who bases his opinion on the fact that, in his view, the plaintiff has failed to prove proposition A is not necessarily in conflict with another learned judge who bases his judgment on a failure to prove propositions B or C. Their Lordships think that on examination the present case will be found to fall within this second category.

The first proposition which the appellants are bound to prove is that English Bay is a public harbour, for English Bay is admittedly situate within the province of British Columbia, and, in virtue of s. 109 of the British North America Act, which necessarily speaks as at the date of the admission of British Columbia to the Union, namely, in 1871, belongs to the Province, unless it can be shown to be

transferred by some other section to the Dominion. The only section appealed to is s. 108, with its concomitant Schedule No. 3, one item whereof is "public harbours."

It may be as well first to see how the decided cases which may be thought to deal with the question stand. There are many cases referred to in the opinions of the learned judges in the courts below where the subject has been more or less approached, but their Lordships think it necessary to refer to only two. They are *Holman v. Green* (1), decided in the Supreme Court of Canada, and the first *Fisheries Case* (2) before this board. *Holman v. Green* (1) had to do with Summerside Harbour. In that case it was contended that the term "public harbours" only extended to such harbours as had had public money expended on them and could not include natural harbours. That contention was repelled, but some expressions were used which would lead to the conclusion that each and every piece of land within the ambit of the harbour over which the tide flowed was transferred in property. Accordingly, when this Board came to deal with the subject in the *Fisheries Case* (2), they said as follows: "It appears to have been thought by the Supreme Court in the case of *Holman v. Green* (1) that if more than the public works connected with the harbour passed under that word, and if it included any part of the bed of the sea, it followed that the foreshore between the high and low water mark, being also Crown property, likewise passed to the Dominion. Their Lordships are of opinion that it does not follow that, because the foreshore on the margin of a harbour is Crown property, it necessarily forms part of the harbour. It may or may not do so, according to circumstances. If, for example, it had actually been used for harbour purposes, such as anchoring ships or landing goods, it would, no doubt, form part of the harbour; but there are other cases in which, in their Lordship's opinion, it would be equally clear that it did not form part of it."

They had previously stated on the general question that it would be, they thought, extremely inconvenient that a determination should be sought of the abstract question: What falls within the description "public harbour"? They declined to attempt an exhaustive definition of the term

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(1) 6 Can. S. C. R. 707.

(2) [1898] A. C. 700 712.

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applicable to all cases. It must depend, they said, to some extent, at all events, upon the circumstances of each particular harbour what forms a part of that harbour.

Their Lordships are bound to say that the expression, "What falls within the description of public harbour" used in that passage has been liable in some cases to misconstruction. In the case of *Holman v. Green* (1), the Court was dealing with a harbour which was an admitted harbour. Accordingly, the expression, "What falls within the description of public harbour," used as it was in commenting upon the case of *Holman v. Green* (1), means—given the existence of a public harbour—what territory falls within it, and does not mean what class of harbour is meant by the expression "public harbour." None the less, however, the words used as to each case depending on its own circumstances may well, as is pointed out by Macdonald J., be also used in regard to the question of determining what is and what is not a public harbour. The extreme view one way, namely, that a public harbour only meant such a harbour and such portions of it as had been the creation of public money, was rejected, and rightly rejected, in *Holman v. Green* (1); the extreme view the other way, namely, that every indentation of the coast to which the public have right of access, and which by nature is so sheltered as to admit of a ship lying there, is a public harbour, has been argued by the appellants in this case and rightly, as their Lordships think, rejected by all the learned judges in the courts below. Potentiality is not sufficient; the harbour must be, so to speak, a going concern. "Public harbour" means not merely a place suited by its physical characteristics for use as a harbour, but a place to which on the relevant date the public had access as a harbour, and which they had actually used for that purpose. In this connection the actual user of the site both in its character and extent is material. The date at which the test must be applied is the date at which the British North America Act, by becoming applicable, effected a division of the assets between the province and the Dominion. That in this case is 1871. Applying this test to English Bay, their Lordships agree on the facts with the great majority of the learned judges below, who hold that English Bay is not a

(1) 6 Can. S. C. R. 707.

public harbour. Nor, as already pointed out, are the remaining judges of an opposite opinion. Some of them prefer to rest their decision on the view that, even supposing English Bay to be a public harbour, Spanish Bank, in accordance with the views of this board in the *Fisheries Case* (1), would be within the ambit, but not a part of it. As their Lordships hold that English Bay is not a public harbour, it is unnecessary to consider this question, though their Lordships indicate no opinion contrary to those of the learned judges below.

This disposes of the main point of the case; but the appellants obtained leave to amend their original pleadings by adding this statement: "The Attorney-General of Canada moreover alleges and submits that, whether English Bay within the area hereinbefore described be or be not a public harbour, the defendants, the Ritchie Contracting and Supply Company, Limited, and Purvis E. Ritchie, have not, and never had, any title, right or authority to remove the sand, gravel or other material naturally forming the bed or foreshores of the said bay, and that the Attorney-General of British Columbia has not, and never had, any right, authority or jurisdiction to authorize the removal of any part of the said bed or foreshores or interference therewith. The Attorney-General of Canada avers on the contrary that, the waters of English Bay within the limits hereinbefore described being navigable waters of the sea, it was and is the duty of the Crown, in so far as it is represented locally, to maintain the bed and foreshores of the said waters in their natural state and to prevent waste of the sea. The Attorney-General of Canada claims a declaration of this honourable Court in the terms of this paragraph, and moreover, an injunction to restrain further waste."

The appellants argued that their title to object flowed from the fact that navigation is one of the subjects entrusted to the Dominion under s. 91 of the British North America Act.

It has often been pointed out that the domain of legislation is quite a different matter from proprietary rights. It may, however, be assumed for the purposes of this argument that if what was being done could be shown to be a danger to navigation the right of the Dominion to make navigation

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laws would give a sufficient title to object. The hypothesis of the situation is that the Province is, in taking away the sand, operating in suo. Any restraint upon that at the instance of the other party must consist of an injunction of the quia timet order. But no one can obtain a quia timet order by merely saying "Timeo"; he must aver and prove that what is going on is calculated to infringe his rights. In the present case there is no averment of a specific character, far less proof, that what is being done at Spanish Bank will affect navigation in the slightest degree. This point, therefore, also fails.

Their Lordships will humbly advise His Majesty to dismiss the appeal with costs.

Solicitors for appellants: *Charles Russell & Co.*

Solicitors for respondents: *Gard, Lyell, Betenson & Davidson.*

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p. 956.MARY BOARD.....*Appellant*;

AND

WILLIAM BOARD.....*Respondent*.ATTORNEY-GENERAL FOR THE }
PROVINCE OF ALBERTA..... } *Intervenant*.ON APPEAL FROM THE SUPREME COURT OF ALBERTA
(APPELLATE DIVISION).*Canada (Alberta)—Divorce—Jurisdiction—Supreme Court.*

The Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85, Imp.), enacts a substantive law of divorce and matrimonial causes, which by virtue of 49 Vict. c. 25 (Dom.) s. 3, is in force in the Province of Alberta, and the Supreme Court of that Province has jurisdiction to administer that law.

Judgment of Supreme Court affirmed.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division (June 26, 1918).

The respondent, William Board, presented a petition to the Supreme Court of the Province of Alberta praying for a decree for the dissolution of his marriage with the appellant on the ground of her adultery. The parties were domiciled in the Province.

The appellant applied by motion for an order dismissing the petition on the ground that the Court had no jurisdiction in the matter. The motion was referred to the Appellate Division, and the Attorney-General for Alberta intervened.

The Appellate Division (Harvey C.J. dissenting) dismissed the motion and remitted the petition for hearing.

The majority of the Court held that the substantive law enacted by the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85, Imp.), was in force in the Province, having been introduced into the territories out of which the Province was formed by 49 Vict. c. 25, Dom., and continued in force by 4 & 5 Edw. 7, c. 3; and that the Supreme Court, being a superior Court of record, had the necessary jurisdiction to

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*Present: VISCOUNT HALDANE, LORD BUCKMASTER, LORD DUNEDIN, LORD SHAW OF DUNFERMLINE, and LORD SCOTT-DICKSON.

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administer the law so introduced. The appeal is reported at 13 Alb. L. R. 362. The Court gave leave to appeal to His Majesty in Council.

1919. May 13, 15. *Maugham K.C.* and *Horace Douglas* for the appellant. (1) The Dominion statute 49 Vict. c. 25 did not intrude into the North-West Territories the English law of Divorce and Matrimonial Causes. This case differs from *Walker v. Walker* (2) in that the above Act, which by s. 3 provides what law is to be administered, itself constitutes the Court to administer the law so introduced and defines its jurisdiction. By s. 14 no reference is made to the Court for Divorce and Matrimonial Causes established by s. 6 of the Matrimonial Causes Act, 1857, in England, although all other Courts are enumerated. The Court established was to have the powers incident to a "Superior Court" in England. That expression does not include jurisdiction in matrimonial causes: *James v. South-Western Ry. Co.* (3); Halsbury's Laws of England vol. ix., p. 11. Since the Act gave no jurisdiction to the Court in Matrimonial Causes, it is to be inferred that the English law of divorce was not intended to be introduced. Further, the Supreme Court Act (7 Edw. 7, c. 3, Alb.), s. 9, in defining the jurisdiction of the Supreme Court, enacts that it shall have the jurisdiction which on July 15, 1870, was vested in enumerated English Courts. This enumeration follows that contained in s. 3 of the Judicature Act, 1873 (36 & 37 Vict. c. 66, Imp.), save that it omits "the Court for Divorce and Matrimonial Causes." This omission must have been intentional, and the only possible inference is that no jurisdiction in matrimonial causes was conferred. Heretofore, no Court in Alberta has ever purported to exercise any jurisdiction in those matters.

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Sir John Simon K.C. and *Hon. M. Macnaghten K.C.* for the respondent were not called upon.

July 3. The judgment of their Lordships was delivered by

(1) The argument was heard continuously with that in *Walker v. Walker*, (supra), (A.C.), of which part

was applicable to this case.

(2) Supra, 947, (A.C.)

(3) (1872) L.R. 7 Ex. 287.

VISCOUNT HALDANE. This is an appeal from a judgment of the Supreme Court of Alberta, by which it was held that there was jurisdiction in the Court to entertain proceedings on a petition for divorce on the ground of adultery.

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The Province was established in 1905 by a Dominion Act of that year (1), being formed out of the North-West Territories. By s. 16 of the Act it was provided that the laws previously in force in the North-West Territories included in the new Province should continue subject to certain reservations which are not material. No law relating to marriage or divorce has been enacted by the Dominion Parliament since the Province was established, and it is therefore necessary to ascertain what was the law relating to marriage and divorce in the territories before the Province was constituted.

In the appeal, immediately previous to this one, of *Walker v. Walker* (2), their Lordships have referred to the legislation by which the Parliament of the Dominion acquired power to make laws relating to the North-West Territories. In 1886, the Dominion Parliament passed, under the powers it had so acquired, an Act to amend the law respecting them (49 Vict. c. 25). By s. 2 of that Act, all its statutes which were not inapplicable were to be in force in the territories, and by s. 3 the laws of England relating to civil and criminal matters, as the same existed on July 15, 1870, were to be in force in the territories, in so far as the same were applicable, unless excluded by Imperial or Dominion statute, or by ordinance of the Lieut.-Governor in Council.

For the reasons given in their judgment in *Walker v. Walker* (2) their Lordships are of opinion that the effect of the Act of 1886 was to make the English law of divorce as established by the Matrimonial Causes Act of 1857 apply to the territories as well as to Alberta.

But there is another question which has been raised in this appeal, which is whether the Supreme Court of the Province of Alberta has been so constituted as to have jurisdiction in matrimonial causes, including divorce.

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The Dominion Act of 1886 (49 Vict. c. 25), by s. 4, established in the territories a Supreme Court of record of original and appellate jurisdiction, called the Supreme

(1) 4 & 5 Edw. 7, c. 3.
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(2) *Supra*, p. 947. (A.C.)

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Court of the North-West Territories. By s. 14, this Court was, for the administration of the laws within them, to possess all such powers and authorities as by the law of England are incident to a Superior Court of civil and criminal jurisdiction, and was to have and exercise all the rights, incidents and privileges of a Court of record, and all other rights, incidents and privileges, as fully to all intents and purposes as the same were on July 15, 1870, used, exercised and enjoyed by any of Her Majesty's Superior Courts of Common Law, or by the Court of Chancery, or by the Court of Probate in England, and was to hold pleas in all, and all manner of actions causes and suits, as well criminal and civil real and personal and mixed, and was to proceed in such actions, causes and suits by such process and course as are provided by law, and as should tend with justice and despatch to determine the same, and should hear and determine all issues of law, and should hear and (with or without a jury as provided by law) determine all issues of fact that might be found, and give judgment and award execution, in as full and ample a manner as might at the date mentioned be done in Her Majesty's Courts of Queen's Bench, Common Bench, or, in matters which regarded the Queen's Revenue (including the condemnation of contraband and smuggled goods), by the Court of Exchequer, or by the Court of Chancery or the Court of Probate in England.

It will be observed that in the above enumeration of Courts the Court of Divorce and Matrimonial Causes, established by the English Matrimonial Causes Act of 1857, is not mentioned.

By s. 91 of the British North America Act, 1867, the subjects of marriage and divorce are among the matters as to which the Dominion Parliament has exclusive jurisdiction. It has never passed any general Act relating to divorce, but it is obvious that it had power to, and did establish the substantive right to divorce in the territories, if the general words of s. 3 of its Act of 1886, putting into force there the law of England as it was on July 15, 1870, were wide enough to cover this subject. Their Lordships have already intimated that they are of opinion that these general words had this effect.

Under s. 92 of the British North America Act, 1867, the administration of justice, including the constitution, main-

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tenance and organization of Provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in these Courts, belongs exclusively to the Provincial Legislatures. Acting under this power, the Legislature of Alberta in 1907 passed a Supreme Court Act (1), establishing a Supreme Court of Alberta as a Superior Court of Civil and Criminal jurisdiction in, and for the Province. By s. 9 of that Act, it was provided that this Court should, within the Province, and for the administration of the laws for the time being in force within it, in addition to any other jurisdiction which before the Act was vested in, or capable of being exercised within the Province by the Supreme Court of the territories out of which it had been carved, possess the jurisdiction which on July 15, 1870, was vested in, or capable of being exercised in England by (1.) the High Court of Chancery, as a Common Law Court, as well as a Court of Equity, including the jurisdiction of the Master of the Rolls as a judge or Master of the Court of Chancery, and any jurisdiction exercised by him in relation to the Court of Chancery as a common law Court; (2.) The Court of Queen's Bench; (3.) The Court of Common Pleas at Westminster; (4.) The Court of Exchequer as a Court of Revenue as well as a Common Law Court; (5.) The Court of Probate; (6.) The Court created by Commissioners of Oyer and Terminer, and of Gaol Delivery, or of any of such Commissions.

Sect. 9 of this Supreme Court Act of 1907 further provided that the jurisdiction aforesaid should include the jurisdiction which, at the commencement of the Act, was vested in or capable of being exercised by all or any one or more of the judges of the said Courts respectively, sitting in court or chambers or elsewhere, when acting as judges or a judge in pursuance of any statute, law or custom; and all powers given to any such Court or to any such judges by any statute; and also all ministerial powers, duties and authorities, incident to any and every part of the jurisdiction so conferred.

It will be observed that in the above enumeration of Courts, the Court for Divorce and Matrimonial Causes, set up by the (English) Matrimonial Causes Act of 1857, is again omitted.

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(1) 7 Edw. 7, c. 3.

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Turning to this English statute, their Lordships observe that its effect is as follows: It transfers to a new statutory Court which it sets up all the jurisdiction of the existing Ecclesiastical Court (which did not extend to divorce a vinculo matrimonii for adultery, but did comprehend divorce a mensa et thoro and lesser matters). This new Court was to be called the Court for Divorce and Matrimonial Causes, and was to sit in London or Middlesex. The right was given to present a petition for dissolution of marriage, for adultery, and for certain other causes, and the decree might include not only such dissolution, but damages as at common law. As regards the composition of the new Court, it was to consist of the Lord Chancellor, the Lord Chief Justices of the Queen's Bench and Common Pleas, the Lord Chief Baron of the Exchequer, the senior Puisne Judge in each of those Courts, and the judge of the Court of Probate, then about to be established. The last-named judge was to be the Judge Ordinary of the new Matrimonial Court, and was to exercise all its ordinary jurisdiction except trials of petitions for nullity of marriage and divorce, and applications for new trials. During his temporary absence the Lord Chancellor was empowered to authorize the Master of the Rolls, the judge of the Admiralty Court, either of the Lords Justices, or any Vice-chancellor, or any judge of the Superior Courts of Law at Westminster, to act as Judge Ordinary of the new Court, and to exercise all the jurisdiction of the Judge Ordinary. The Matrimonial Causes Act of 1857 was amended by a further Act in 1859, under which all the judges of the three Common Law Courts were to be judges of the new Divorce Court.

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Their Lordships think that the way in which the Act of 1857, as it stood originally unaltered by subsequent legislation such as the Judicature Acts, constituted the existing judges of other Courts judges of the new Court detracts from the weight of any inference based on the omission of a reference to it in the Acts setting up the Supreme Courts of the North-West Territories and of Alberta. Had it been intended to exclude jurisdiction in divorce it would have been necessary to say so; for the language of s. 9 of the Act of 1907 in particular is so comprehensive that it confers on the Supreme Court of Alberta all the capacity given by the Divorce Acts to the judges of the other Courts in England to act as the Court established by those Acts. Their

Lordships would arrive at this conclusion even if the words "at the commencement of this Act" in s. 9 of the Act of 1907 were treated as rendered nugatory by the changes effected by the English Judicature Act.

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But the matter does not rest here. The right to divorce had, before the setting up of a supreme and superior Court of record in Alberta, been introduced into the substantive law of the Province. Their Lordships are of opinion that, in the absence of any explicit and valid legislative declaration that the Court was not to exercise jurisdiction in divorce, that Court was bound to entertain and to give effect to proceedings for making that right operative. Had the Legislature of the Province enacted that its tribunals were not to give effect to the right which the Dominion Parliament had conferred in the exercise of its exclusive jurisdiction, a serious question would have arisen as to whether such an enactment was valid. But not only is there no such enactment but, on the mere question of construction of the language of the Provincial Act of 1907, their Lordships are of opinion that a well-known rule makes it plain that the language there used ought to be interpreted as not excluding the jurisdiction. If the right exists, the presumption is that there is a Court which can enforce it, for if no other mode of enforcing it is prescribed, that alone is sufficient to give jurisdiction to the King's Courts of justice. In order to oust jurisdiction, it is necessary, in the absence of a special law excluding it altogether, to plead that jurisdiction exists in some other Court. This is the effect of authorities, such as the well-known judgment of Lord Mansfield in *Mostyn v. Fabrigas* (1), and the judgment of Lord Hardwicke in *Earl of Derby v. Duke of Atholl*. (2) They are collected in the admirable opinion of Stuart J. in the Supreme Court in the present case, from whose reasoning, as well as from the arguments employed by the other learned judges there, their Lordships have derived much assistance. They only desire to add that independently of the rule just referred to, there is another principle of construction which would, in their opinion, have been, by itself, sufficient to dispose of the question whether the words of the Act of 1907 excluded matrimonial jurisdiction. That Act set up a Superior Court, and it is the rule as

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(1) (1774) 1 Cowp. 161.

(2) (1748) 1 Ves. Sen. 201.

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regards presumption of jurisdiction in such a Court that, as stated by Willes J. in *London Corporation v. Cox* (1) nothing shall be intended to be out of the jurisdiction of a Superior Court, but that which specially appears to be so.

As the result their Lordships entertain no doubt that the second point raised was decided correctly as well as the first one. They will therefore humbly advise His Majesty that the appeal should be dismissed. As costs have not been asked for there will be no costs of this appeal.

Solicitors for appellant: *Lawrence Jones & Co.*

Solicitors for respondent and intervenant: *Blake & Redden.*

(1) (1867) L.R. 2 H.L. 239, 259.

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EDGAR WALKER.....APPELLANT;

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CATHERINE WALKER.....RESPONDENT;

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ON APPEAL FROM THE COURT OF APPEAL OF MANITOBA.

Canada (Manitoba)—Divorce—Jurisdiction—Court of King's Bench.

The Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85, Imp.) enacts a substantive law of divorce and matrimonial causes, which by virtue of 51 Vict. c. 33 (Dom.), s. 1, is in force in the province of Manitoba, and the Court of King's Bench of that province has jurisdiction to administer that law.

Watts v. Watts [1908] A. C. 573 applied.

Judgment of the Court of Appeal affirmed.

APPEAL from a judgment of the Court of Appeal of Manitoba (April 15, 1918), reversing a judgment of the Court of King's Bench (May 17, 1917).

The respondent, Catherine Walker, petitioned the Court of King's Bench for the Province of Manitoba praying that her marriage with the appellant might be declared null and void on the ground of his impotency. The parties were domiciled in Manitoba.

Galt, J., who heard the petition, found that the petitioner had made out a sufficient case for the annulment of her marriage under the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85, Imp.), and was entitled to a decree provided that that Act was in force in Manitoba, and provided that the Court had jurisdiction. Since the Court in Manitoba had not theretofore exercised any jurisdiction in divorce or matrimonial causes, the learned judge thought that if the jurisdiction existed it should be declared by the Court of Appeal. He accordingly dismissed the petition.

Upon an appeal to the Court of Appeal the Attorney-General for Manitoba intervened.

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* *Present*: VISCOUNT HALDANE, LORD BUCKMASTER, LORD DUNEDIN, LORD SHAW OF DUNFERMLINE, and LORD SCOTT-DICKSON.

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The Court of Appeal unanimously reversed the judgment of Galt, J. and remitted the petition to be heard and disposed upon the evidence already adduced and such further evidence as might be offered.

The learned judges held that the Court of King's Bench for Manitoba had by virtue of s. 1 of 51 Vict. c. 33 (Dom.) and s. 10 of the King's Bench Act (R. S. Man., 1913, c. 46), if not by enactments of the Council of Assiniboia prior to the admission of Rupert's Land into the Dominion, the same jurisdiction to deal with matrimonial causes as the Courts have in England under the Matrimonial Causes Act, 1857. The appeal is reported at 28 Man. L.R. 495.

The Court of Appeal gave leave to appeal to His Majesty in Council.

1919. May 12, 13. *Maugham K.C.* and *Horace Douglas* for the appellant. This case is distinguishable from *Watts v. Watts*. (1) When that decision was given divorces had been granted in British Columbia for many years; grave results would have followed from a decision that the Courts had no jurisdiction. In Manitoba, on the other hand, the Courts have never entertained matrimonial causes; further, the legislation upon which the jurisdiction of the Courts depends is different. The Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85, Imp.), does not form part of the law of Manitoba. The laws in force in Rupert's Land and the North-West Territories, by virtue of 1 & 2 Geo. 4, c. 66 (Imp.), s. 6, were (except as to land) the laws in force in Upper Canada. Upon the creation of the province of Manitoba and its admission to the Union, s. 2 of 33 Vict. c. 3 (Dom.), validated by the Imperial statute 34 & 35 Vict. c. 28, s. 5, brought into force s. 129 of the British North America Act, 1867 (30 & 31 Vict. c. 3, Imp.), and continued in Manitoba the laws previously in force—namely, those of Upper Canada. There was in Upper Canada no law of divorce, but only a power in the Court of Chancery to grant alimony under Cons. Stat. U. C., 1859, c. 12, s. 29. The Dominion statute of 1888, 51 Vict. c. 33, had not the power, and cannot have been intended, to declare that the laws of England, more especially the laws relating to divorce, had been in force since July 15, 1870. It must therefore be given a restricted effect. That

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statute was enacted in consequence of the erroneous decision in *Sinclair v. Mulligan* (1); and, as is stated in the preamble, was passed "for the removal of doubts." There was no doubt whether there was any law of divorce in the Province. Had an alteration of the law so important as that contended for been intended the statute would have enacted it in specific terms. The Parliament of Canada has consistently refused to delegate to the Courts of Justice its powers to grant divorces: see *Gemmill on Divorce* (Toronto, 1889), and *Lefroy's Canada's Federal System*, p. 147. Further, whether or not the English statute of 1857 forms part of the law of Manitoba, the Court of King's Bench has no jurisdiction to grant a divorce. The statute creating the Supreme Court (now the Court of King's Bench), namely, 34 Vict. c. 2 (Man.), and later statutes including R. S. Man., 1913, c. 46, defining the jurisdiction of that Court, while specifying the matters in which jurisdiction is conferred do not mention divorce. The statutes from 38 Vict. c. 12 (Man.), onwards, including the Act of 1913, confined the jurisdiction to matters "relative to property and civil rights." Those words refer to the provincial legislative power under s. 92, head 13, of the British North America Act, 1867, and consequently exclude "marriage and divorce," a legislative subject confided to the Dominion by s. 9, head 26. [Reference was also made to the Charter of the Hudson Bay Co. of July 15, 1870; to the Imperial Acts, 3 & 4 Vict. c. 35 (uniting Upper and Lower Canada); the Rupert's Land Act (31 & 32 Vict. c. 105); 32 & 33 Vict. c. 3; to 33 Vict. c. 3 (Can.); the Ordinances of Assiniboia (No. 53 of 1862 and T. of 1864); and to *M, falsely called S.V.S.* (2); *Scott v. Scott* (3); *Sheppard v. Sheppard*. (4)]

Sir John Simon K.C. and *Hon. M. Macnaughten K.C.* for the respondent, and *John Allen* for the Attorney-General for Manitoba, intervenant, were not called upon. 1919 A.C. p. 950

July 3. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. The question to be decided in this case is one of much importance, and is of a class as to which their Lordships always desire that, before any topic falling

- (1) (1887) 3 Man. L.R. (Q.B.) 481. (3) (1891) 4 Brit. Col. Rep. 316.
 (2) (1897) 1 Brit. Col. Rep., Part I., (4) (1908) 13 Brit. Col. Rep. 486.

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within it is brought before them on appeal, that topic should have previously been submitted for consideration by the Supreme Court of Canada. However, in bringing the appeal directly from the Court of Appeal in the Province, the appellant is within his legal right, and it becomes the duty of this Board to dispose of the question raised.

That question is whether the Court of King's Bench for the province of Manitoba has jurisdiction to deal with a petition for a decree declaring a marriage null and void on the ground of impotency. The answer to this question depends on what is the law relating to dissolution of marriage in the Province, and to the jurisdiction of its Court of King's Bench.

It will be convenient in the first place to refer briefly to the history of the territory of the Province. Originally, what is now Manitoba formed part of so much of what is to-day the territory of Canada as had been included by King Charles II. in the Charter which he granted in 1670 to the Hudson's Bay Co. The area comprised in this Charter was treated as extending to what became known later as Rupert's Land and the North-Western Territory. When the Dominion of Canada was formed in 1867 the Hudson's Bay Company's territory was not brought within it. Its inclusion, at all events partially, was however rendered practicable by subsequent legislation. In particular by s. 146 of the British North America of 1867, it had been provided that the Sovereign in Council might, on Address from the Dominion Parliament, admit Rupert's Land and the North-Western Territory into the Union on terms and conditions to be set out in the Address and approved by the Sovereign. By Order in Council of June 23, 1870, Rupert's Land and the North-Western Territory were admitted accordingly into the Dominion. The terms and conditions are not important for the present question.

1919 A.C.
p. 951.

Before referring to the steps which were taken to form what became the province of Manitoba, after this admission, it is important to see what was the state of the law in Rupert's Land and the North-Western Territory at the time when the admission took place. The Charter of 1670 enabled the Hudson's Bay Co. to make laws and administer justice in the region confided to them. There is no doubt that the settlers brought with them to that region such of

the laws of England in 1670 as were applicable under the circumstances. In course of time Imperial legislation took place, designed apparently for the protection of those living within Indian territories and other parts of America outside Upper and Lower Canada and the civil government of the United States, legislation long prior to Confederation, and which gave jurisdiction to the Courts of Upper Canada to entertain suits arising outside Upper Canada, but within these regions, and to deal with the subject-matter as if (with certain exceptions) the law of Upper Canada applied. Their Lordships do not think that the provisions so made took away the general power to make laws and set up Courts conferred by the Charter of 1670 on the company.

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What afterwards became the limits of the Province of Manitoba included a part of Rupert's Land called the District of Assiniboia. For this district the company had set up a Governor and Council, who acted as a Court of Justice. At a meeting of this body in 1851 an Ordinance was passed providing that, in place of the laws of England as they were at the date of the original Charter of 1670, these laws as they had become at the date of the accession of Queen Victoria should regulate the proceedings of the Court. In 1864 there was substituted for the laws at the date of the Queen's accession "all such laws of England of subsequent date as may be applicable."

Whatever relevance these steps in legislation might possess were the answer to the present question dependent on how far the law of England, as it stood at the time of Confederation, was applicable in Manitoba or in part of it, the point becomes unimportant in view of what followed after Confederation. For the Dominion Parliament in the first place passed an Act in 1869 (1) which provided ad interim that all the laws which should be in force in Rupert's Land and in the North-Western Territory at the time of their admission, which was then likely to take place, should, so far as consistent with the British North America Act, 1867, remain in force until altered. Shortly after this, in 1870, the Dominion Parliament passed a second Act (2) by which the Province of Manitoba was formed out of Rupert's Land and the North-Western Territory, and the provisions of the British North America Act (except those

1919 A.C.
p. 952.

(1) 32 & 33 Vict. c. 3.

(2) 33 Vict. c. 3.

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parts which were inapplicable to the Provinces generally then composing the Dominion) were made to apply to the new Province of Manitoba in the same way and to the like extent as if this Province had been originally included at Confederation, with provisions for the representation of Manitoba in the Dominion Parliament and for the establishment of a Legislature in the Province. In order to get rid of doubts as to the power of the Dominion Parliament to enact these statutes an Imperial Act was passed in 1871 (1), which confirmed them as from the dates at which the Governor-General assented to them in the Queen's name, and provided generally that the Dominion Parliament should have power to establish new Provinces in territory within the Dominion but not included in any of its existing Provinces, and to make provision for administration and for the peace, order and good government of any such Provinces, and for any territory not for the time being included in any Province.

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The most important of these statutes for the purposes of the present question is the second of the Dominion Acts, that of 1870, providing for the formation and government of Manitoba, and confirmed as from its date by the Imperial Act of 1871. By s. 2 of this Dominion Act it had been enacted, as their Lordships have already stated, that the provisions of the British North America Act, 1867 (excepting those not applicable to the whole of the Provinces of the Dominion), should apply to the new Province of Manitoba. The effect of this was that the Legislature of the Province was enabled, when set up, to pass an Act in 1871 (2) establishing a Supreme Court with jurisdiction over all matters of law and equity. As far as possible, consistently with the circumstances of the country, the laws of evidence and the principles which governed the administration of justice in England were to obtain in this Supreme Court of Manitoba. Moreover by s. 52, so much of the laws of the Governor and Council of Assiniboia as were not inconsistent with the Act were to be extended to the whole of the province of Manitoba.

It may be that the effect of the amending Ordinance already referred to, passed by the Council of Assiniboia and

(1) 34 & 35 Vict. c. 28.

(2) 34 Vict. c. 2 (amended by
35 Vict. cc. 3 and 4).

declaring that the laws of England not only down to but subsequent to Queen Victoria's accession were to regulate the proceedings of the General Court, taken together with the statutes just referred to, and with s. 52 of the Manitoba Act of 1871, were sufficient to make all existing English law, except so far as inapplicable, extend to the new Province. But their Lordships are of opinion that it is unnecessary to consider this point, in view of the provision made by an Act of the Dominion Parliament passed in 1888 (1) to remove doubts as to the application of certain laws to the province of Manitoba. This Act, if it extended to the subject of marriage and divorce, was, in so far as it did so, plainly within the exclusive power of legislation conferred on the Dominion Parliament by s. 91 of the British North America Act, 1867. It provided by s. 1 that, with an exception that is not material, the laws of England relating to matters within the jurisdiction of the Parliament of Canada, so far as the same existed on July 15, 1870, had been, as from that date, and were in force in Manitoba, in so far applicable to the province and unrepealed by Imperial or Dominion legislation.

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In the case of *Watts v. Watts* (2) it was decided by this Board that legislation in British Columbia, whereby it was declared that "the civil and criminal laws of England as the same existed on November 19, 1858, and so far as the same are not from local circumstances inapplicable, are and shall be in force," was sufficient to make the provisions of the English Matrimonial Causes Act of 1857 apply so far at least as to enable the Court of British Columbia to grant divorce for adultery. Even if their Lordships were disposed to treat this decision as not binding on them, they see no reason to dissent from it, or to doubt the application *mutatis mutandis* of its principle to the present case. For the Matrimonial Causes Act, 1857, did much more than set up a new Court and regulate its procedure. It introduced new substantive law, and gave to the Court it constituted not only the jurisdiction over matrimonial questions which the old ecclesiastical tribunals possessed, but a new jurisdiction, arising out of the principle, then for the first time introduced into the law of England, of the right to divorce *a vinculo matrimonii* for certain matrimonial offences.

1919 A.C.
 p. 954.

(1) 51 Vict. c. 33.

(2) [1908] A.C. 573.

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This right had thus been made part of the law of England by July 15, 1870, and their Lordships are of opinion that it became part of the substantive law of Manitoba. The circumstance that Ontario has no such law as to divorce does not appear to their Lordships to militate against this construction of the Dominion Act in question.

A further point has however been raised by the appellant. It is that the Dominion Parliament, even assuming that it introduced new substantive law on the subject, had committed no jurisdiction to the Courts of Manitoba to apply that law, and that the Legislature of Manitoba had not, when constituting its Supreme Court, endowed it with power to do so. It is sufficient that their Lordships should point out that in 1913, prior to the proceedings in the present case, the King's Bench Act of that year passed by the Legislature of the province had provided that the Court of King's Bench, which had taken the place of the former Supreme Court, was to be a Court of Record of original jurisdiction, and to possess and exercise all such powers and authorities as by the laws of England are incident to a Superior Court of Record of civil and criminal jurisdiction in all matters civil and criminal whatsoever, and was to possess all the rights and privileges of such Courts, as fully as the same were on July 15, 1870, possessed by any of her late Majesty's Superior Courts of Common Law at Westminster or by the Court of Chancery at Lincoln's Inn, or by the Court of Probate, or by any other Court in England having cognizance of property and civil rights and of crimes and offences. The Act goes on to direct the Court to hold plea in all manner of actions, suits and proceedings, whether at law or in equity or probate or howsoever otherwise.

1919 A.C.
p. 955.

Their Lordships find nothing in the context of the Act to limit the natural meaning of these words, and they are therefore of opinion that the case is indistinguishable from what was decided in *Watts v. Watts* (1) by this Board. It appears to them to be clear that, in the absence of words limiting its jurisdiction under the Act referred to, the Court of King's Bench of the province of Manitoba was rightly

(1) [1908] A.C. 573.

held by the learned judges in the Court of Appeal of the Province, as the result of the careful and learned judgments they delivered, to have had jurisdiction, as contended by the respondent and the intervenant.

Their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed. It has been agreed that nothing should be said about costs.

Solicitors for appellant: *Lawrence Jones & Co.*

Solicitors for respondent and intervenant: *Blake & Redden.*

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[PRIVY COUNCIL.]

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TORONTO GENERAL TRUSTS } APPELLANTS;
CORPORATION..... }

AND

THE KING.....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

1919 A.C.
p. 679.

Canada (Alberta)—Taxation—Succession Duty—Registered Mortgage—Property in Province—Succession Duties Act, 1914 (5 Geo. 5, c. 5, Alberta), s. 7.

A mortgage of land in the province of Alberta to a person domiciled in the province of Ontario was registered under the Land Titles Act of Alberta (6 Edw. 7, c. 24). That Act provides that a mortgage after registration shall be retained in the office of the registrar of titles. The mortgage was executed in duplicate, the registrar and the mortgagee each retaining one of the documents; that retained by the mortgagee was in his possession when he died in Ontario:—

Held, that the debt secured by the mortgage was property of the mortgagee in Alberta and was accordingly chargeable with succession duty under s. 7 of the Succession Duties Act, 1914 (5 Geo. 5, c. 5), of that Province.

Commissioner of Stamps v. Hope [1891] A. C. 476 discussed.

Judgment of the Supreme Court of Canada affirmed.

APPEAL by special leave from a judgment of the Supreme Court of Canada (October 9, 1917) affirming a judgment of the Appellate Division of the Supreme Court of Alberta, which affirmed a judgment of Hyndman J.

The action was brought in the Supreme Court of Alberta against the appellants to recover succession duty under the Succession Duties Act, 1914 (5 Geo. 5, c. 5), of that Province. The following special case was stated by Agreement:

1. The defendants are the administrators, with the will annexed, of Richard Grigg deceased, who died at the city of Ottawa, in the province of Ontario, on or about January 5, 1916, and who had prior to and at the time of his death his domicile in the province of Ontario. 2. The property passing by the will of the deceased is of an aggregate value sufficient to make such property as is situate within the province of Alberta liable to pay succession duty under the Succession Duties Act (1) at certain rates. 3. Part of the property left by the deceased, and passing on his death,

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* *Present*: VISCOUNT HALDANE, VISCOUNT FINLAY, VISCOUNT CAVE, LORD DUNEDIN, and LORD SHAW OF DUNFERMLINE.

(1) 5 Geo. 5, c. 5 (Alberta).

consisted of mortgages secured upon lands in the province of Alberta made in favour of the said Richard Grigg in his lifetime, and made under the Land Titles Act. (1) 4. The said mortgages were executed under the seal of the mortgagors and contain covenants for payment of principal, interest, etc., as well as the statutory covenants provided for by the Land Titles Act. (1) 5. A duplicate of each of the said mortgages was in the custody and possession of the deceased, Richard Grigg, at his place of business in the city of Ottawa, in the province of Ontario. The other duplicate of each of the said mortgages was registered in the proper Land Titles office in the province of Alberta, under the provisions of the Land Titles Act. 6. It is agreed that the Court may without the necessity of evidence being adduced as to the law of Ontario decide whether by that law the mortgages in question herein are specialty debts?

The question submitted for the opinion of the Court was, whether the mortgages above described were property upon which succession duty was payable in Alberta.

The trial judge, Hyndman J., held that succession duty was payable. By arrangement between the parties an appeal to the Appellate Division was formerly dismissed without argument. Upon a further appeal to the Supreme Court of Canada, that Court (Fitzpatrick C.J. and Davies, Idington, Duff JJ., Anglin J. dissenting) affirmed the decisions. The appeal to the Supreme Court of Canada is reported at 56 Can. S.C.R. 26.

1919. March 21. *Douglas Hogg K.C.* and *Horace Douglas* for the appellants. The mortgage debt was not property situate in the province of Alberta. The mortgage did not create any interest in the mortgaged lands. The situs of a specialty debt is the place where the instrument is "conspicuous," that is where it actually is: *Wentworth's Office of Executor*, 1720 ed., p. 46. That rule has been recognized in Canada, e.g. in *In re Muir Estate* (2), which supports the appellants' contention. The instrument here to be considered is the mortgage deed which was in the possession of the testator in Ontario. The duplicate deposited with the registrar cannot be regarded as the original deed. The Land Titles Act does not require that the document deposited shall be under seal, and s. 65,

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(1) 6 Edw. 7, c. 24 (Alberta).

(2) (1915) 51 Can. S.C.R. 428.

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sub-s. 5, shows that the deposited duplicate is not "the mortgage." The decision of the Board in *Commissioner of Stamps v. Hope* (1) is conclusive in the appellants' favour, since in that case a duplicate of the mortgage must have been deposited with the registration officer in New South Wales under s. 35 of 26 Vict. No. 9 of that State. If the situs of a mortgage debt were the place of registration obvious difficulties would arise where the land was in different provinces. [Reference was also made to *Payne v. The King* (2); *Walsh v. The Queen* (3); *Henty v. The Queen* (4); and *Rex v. Lovitt*. (5)]

Sir John Simon K.C. and *Hon. M. Macnaghten* for the respondent. The question to be considered is, where is the secured debt situated? It is situated in Alberta since it is by the legislation of that province that the security is protected by registration and its transfer has to be effected: see *Dicey's Conflict of Law*, 2nd ed., pp. 746, 751. It does not appear from the report of *Commissioner of Stamps v. Hope* (1) that the mortgage there in question was deposited with the registration officer. The report of the argument in *Payne v. The King* (6) shows that the third instrument there considered, a mortgage of land in New South Wales, was in the hands of the testator in Victoria; Lord Macnaghten in delivering the judgment said "the debt, though a specialty debt in New South Wales, was a simple contract debt in Victoria." *Commissioner of Stamps v. Hope* (1) was cited to the Board in that appeal and was discussed in the argument. Equally in the present case there was a specialty debt in Alberta. The appellants' rights arise in the province, and under the jurisprudence of the province. [They were stopped.]

1919 A.C.
p. 682.

April 11. The judgment of their Lordships was delivered by

VISCOUNT CAVE. This is an appeal by the administrator with the will annexed of Richard Grigg, deceased, from a judgment of the Supreme Court of Canada, affirming a judgment of the Supreme Court of the Province of Alberta, Appellate Division, which in its turn affirmed a judgment of Hyndman J. upon a special case submitted to him. The

(1) [1891] A.C. 476.

(2) [1902] A.C. 552.

(3) [1894] A.C. 144.

(4) [1896] A.C. 567.

(5) [1912] A.C. 212.

(6) [1902] A.C. 552, 554, 560.

effect of the judgments under appeal was to declare that certain mortgages secured upon land in the province of Alberta which were held by the testator, who was domiciled and died in the province of Ontario, were subject to succession duty in the province of Alberta, and the question raised by this appeal is whether they were in fact so subject.

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By s. 92 of the British North America Act, 1867, it is provided that in each province the Legislature may exclusively make laws in relation (among other matters) to direct taxation within the province. By s. 7 of the Succession Duties Act of Alberta (Alberta Statutes of 1914, c. 5) it is enacted that: "Save as otherwise provided, all property of any person situate within the province and passing on his death shall be subject to succession duties," at certain rates therein set forth. By s. 3 of the same Act the word "property" is defined as including real and personal property of every description. It was clearly within the power of the Legislature of the province of Alberta to pass the Succession Duties Act above referred to, and the only question is whether the mortgages referred to in these proceedings were at the date of the testator's death "situate within the province."

The mortgages in question were executed and registered under the Land Titles Act of Alberta (Alberta Statutes of 1906, c. 24). By s. 23 of that Act it is enacted as follows: "Instruments registered in respect of or affecting the same land shall be entitled to priority the one over the other according to the time of registration and not according to the date of execution; and the registrar, upon registration thereof, shall retain the same in his office, and so soon as registered every instrument shall become operative according to the tenor and intent thereof, and shall thereupon create, transfer, surrender, charge or discharge, as the case may be, the land or the estate or interest therein mentioned in the instrument."

1919 A.C.
p. 683.

By s. 60 of the same Act it is enacted that mortgages shall be in a form set out in the schedule to the Act. This form does not provide for sealing, but a seal was in fact affixed to each of the mortgages in question in this case. No express provision is made in the Act for the execution of mortgages in duplicate, but the language of s. 63 and s. 65, sub-s. 5, appears to assume that a duplicate will be executed

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and retained by the mortgagee, and this appears in fact to be the general practice. In the present case each of the mortgages was executed in duplicate, one of such duplicates being delivered to and retained by the registrar in accordance with the statute, and the other being delivered to the mortgagee and retained by him. At the date of the death of the mortgagee the duplicate mortgages delivered to him were in his possession at his residence in Ottawa, in the province of Ontario, where he died, while those deposited at the registry were, of course, in the possession of the registrar in Alberta.

1919 A.C.
p. 684.

A claim to succession duty having been made, the administrator contended that the mortgages in question were, at the date of the testator's death, situate, not in Alberta, but in Ontario, and supported his contention by reference to the rule of law which provides that, whereas a simple contract debt is to be deemed to be within the area of the local jurisdiction within which the debtor for the time being resides, the locality of a specialty debt is the place where the specialty is found at the time of the creditor's death: *Wentworth on the Office of Executor*, ed. 1720, p. 46; *Bacon's Abridgment*, tit. *Executors and Administrators* (E), p. 462; *Gurney v. Rawlins* (1); *Commissioner of Stamps v. Hope*. (2) This rule has been recognized in numerous decisions both here and in the Dominion of Canada, and the general principle must be regarded as well settled. But in the present case there is a difficulty in applying the rule, owing to the fact that each of the mortgages was created and evidenced by duplicate deeds, and that at the date of the testator's death one of the deeds was in the province of Ontario and the other in the province of Alberta. An attempt was made to show that, having regard to the terms of the Land Titles Act, the duplicate of each mortgage held by the testator was the principal or dominant instrument, but in their Lordships' opinion no such ascendancy was made out, and the deed produced to and retained by the registrar under the provisions of the statute was not of less importance than the duplicate delivered to and retained by the mortgagee. In these circumstances any argument which goes to show that, under the rule which fixes the locality of a specialty debt in

(1) (1836) 2 M. & W. 87.

(2) [1891] A.C. 476.

the place where the specialty is found, the debts in this case were situate in Ontario at the testator's death, is equally effective to prove that they were situate in Alberta; and yet it is plainly impossible to hold that they were situate in both provinces at once. A similar difficulty in applying the rule may arise in any case where an obligation is created or evidenced by two or more deeds of collateral value which are found in different jurisdictions; and the truth appears to be that in such cases the rule gives no guidance on the question of the locality of the debt, and regard must be had to the other circumstances of the case.

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In the present case the circumstances, other than the single fact of the presence of a duplicate deed in the province of Ontario, are all in favour of the conclusion that the mortgages were situate in Alberta. It is established by formal admissions made in the course of the proceedings that at the date of the execution of the mortgages the mortgagors were resident in the province of Alberta, and that the place of payment of the debt was in each case in the province of Alberta. The debts were secured, not only by the personal obligation of the mortgagors, but also by mortgages which created interests in lands in Alberta, and this fact cannot be put out of account. See *Walsh v. The Queen*. (1) The mortgages are executed in a form prescribed by the Land Titles Act of Alberta, and derive their force and effect from the terms of that statute, and this is not less the case because a seal has been voluntarily affixed to each mortgage. The administrator cannot enforce any of his securities without procuring registration of his succession in the Alberta registry and relying on documents registered in that province; and though the debtors may be prepared to pay the debts secured without putting the administrator to the trouble of suing or of realizing his securities, it is plain that they would not do so except on the terms of the mortgaged lands being released in accordance with Alberta law. In short, the administrator cannot recover the debts or have the benefit of his securities without claiming the protection and assistance of the Alberta law; and the case falls within the test laid down by Lord Cranworth in *Wallace v. Attorney-General* (2) as to the limitation on the imposition of succession duty, namely, that such a duty must be considered to be

1919 A.C.
p. 685.

(1) [1894] A.C. 144, 148.

(2) (1865) L.R. 1 Ch. 1, 9.

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imposed only on those who claim title by virtue of the law of the taxing State.

When all these circumstances are taken into account, the only possible conclusion appears to be that the mortgages in question in this case were at the testator's death situate in Alberta. This conclusion is in accordance with the decisions of the Board in the cases of *Walsh v. The Queen* (1); *Henty v. The Queen* (2); and *Payne v. The King* (3); and is not inconsistent with the judgment in *Commissioner of Stamps v. Hope*. (4) It is indeed suggested that, as the mortgage referred to in the last-mentioned case was registered in New South Wales, it must be assumed that it was executed in duplicate, and that one original was filed in the office of the Registrar-General of New South Wales in accordance with s. 35 of the Real Property Act of New South Wales (26 Vict. No. 9), and accordingly that the decision governs the present case. But no reference to such an execution in duplicate is found either in the record of the case, in the arguments of counsel, or in the judgment of the Board; and the case cannot therefore be taken as an authority on the question of the locality of a deed of which duplicates are found in two different jurisdictions. (5)

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p. 686

For the above reasons their Lordships have come to the conclusion that this appeal should be dismissed.

Their Lordships understand that it has been agreed by the parties that they will bear their own costs of the appeal. No order therefore will be necessary respecting them.

Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants: *Bischoff, Coxe, Bischoff & Thompson*.

Solicitors for respondents: *Blake & Redden*.

(1) [1894] A.C. 144.

(2) [1896] A.C. 567.

(3) [1902] A.C. 552.

(4) [1891] A.C. 476.

(5) As the special case in *Commissioner of Stamps v. Hope* described the mortgaged lands as "runs or Crown leaseholds" (see

12 N.S.W.R. 220) they presumably had not been brought under 26 Vict. No. 9 (see s. 12). The registration of the deed therefore would appear not to have been under that Act but under the Deeds Registration Act, 1843 (7 Vict. c. 16); that Act, by s. 13, requires only a copy signed by one of the parties to be deposited.

[PRIVY COUNCIL.]

In re THE INITIATIVE AND REFERENDUM ACT.

ON APPEAL FROM THE COURT OF APPEAL OF MANITOBA.

J.C.*
1919

July 3.

1919 A.C.
p. 935.

Canada (Manitoba)—Legislative Power—Constitution of Province—Office of Lieutenant-Governor—Initiative and Referendum Act (6 Geo. 5, c. 59, Manitoba)—Invalidity—Colonial Laws Validity Act, 1865 (28 & 29 Vict. c. 63), s. 2—British North America Act, 1867 (30 & 31 Vict. c. 3), s. 92, head 1.

The British North America Act, 1867, s. 92, head 1, which empowers a Provincial Legislature to amend the constitution of the Province, "excepting as regards the office of Lieutenant-Governor," excludes the making of a law which abrogates any power which the Crown possesses through the Lieutenant-Governor who directly represents the Crown.

The Initiative and Referendum Act, being 6 Geo. 5 c. 59 of the Acts of the Legislative Assembly of Manitoba, is invalid, since it would compel the Lieutenant-Governor to submit a proposed law to a body of voters totally distinct from the legislature of which he is the constitutional head, and would render him powerless to prevent it from becoming an actual law if approved by those voters. The offending provisions of the Act being so interwoven with its scheme as not to be severable, the Colonial Laws Validity Act, 1865, cannot be applied to validate any part of the Act.

Judgment of the Court of Appeal affirmed.

APPEAL by special leave from a judgment of the Court of Appeal of Manitoba (December 20, 1916).

By an Order in Council made on August 22, 1916, in pursuance of R. S. Man. 1913, c. 38, the following questions were referred by the Lieutenant-Governor in Council to the Court of King's Bench of Manitoba for hearing and consideration—namely, (1.) Had the Legislative Assembly jurisdiction to enact the Initiative and Referendum Act, and, if not, in what particular or respect has it exceeded its powers? (2.) Had the Legislative Assembly jurisdiction to enact ss. 3, 4, 4A, 7, 8, 11, 12, 17 (sub-s. 1), of said Act, or any of them; and, if so, which of them?

**Present*:—VISCOUNT HALDANE, LORD BUCKMASTER, LORD DUNEDIN, LORD SHAW OF DUNFERMLINE, and LORD SCOTT-DICKSON.

(1) The Initiative and Referendum Act (6 Geo. 5), c. 59, Manitoba, s. 7: "A proposed law so referred to the electors and approved of by a majority of the votes polled thereon shall, unless a later date is specified therein, take effect and become law, subject, however, to the same powers of veto and disallowance as are provided in the British North

America Act or as exist in law with respect to any Act of the Legislative Assembly, as though such law were an Act of the said assembly, on a date to be fixed by proclamation to be made by the Lieutenant-Governor in Council, which date shall not be later than thirty days after the Clerk of the Executive Council shall have published in the Manitoba Gazette a

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The Act referred to was 6 Geo. 5, c. 59 of the Legislative Assembly of Manitoba, and provided that laws might be made and repealed by the direct vote of the electors of the province at large. The provisions by which the Act proposed to carry out that object are summarized in the judgment of their Lordships; ss. 7 and 11 are set out in the footnote. (1)

1919 A.C.
p. 936.

On the matter coming on for hearing before Mathers C.J., counsel having consented that the said questions should be answered without argument, judgment was given on October 27, 1916, declaring that the Legislative Assembly had jurisdiction to enact the said Acts and the sections in question.

The appeal was argued in the Court of Appeal before Howell C.J., and Richards, Perdue, Cameron and Haggart JJ.A., and judgment was given on December 20, 1916, allowing the appeal and answering the questions submitted as follows: "To the first question, No. The particulars in which the Legislative Assembly exceeded its powers are set forth in the several reasons for judgment delivered by members of the Court and forwarded herewith. To the second question, as to ss. 3, 4, 4A, 7, 9, and 11, the answer is 'No.' As to s. 12 and s. 17 (sub-s. 1) the answer is: 'Taken with their context, No.' "

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The reasons of the learned judges, which are fully reported at 27 Man. L. R. 1, may be shortly stated as follows. The British North America Act, 1867, declared that for each Province there should be a Legislature, in which s. 92 vested the power of lawmaking; the Legislature could not confer that power upon a body other than itself. The procedure proposed by the Act in question would not be an Act of a Legislature within s. 92, would be wholly opposed to the spirit and principles of the Canadian constitution, and would override the Legislature thereby provided. Further, the power to amend the constitution given by s. 92, head 1, expressly excepted "the office of Lieutenant-Governor."

statement of the result of the vote on said law in accordance with s. 35 hereof."

Sect. 11: "In the event of such Act or law or part or parts thereof not being approved of by a majority of the votes polled at such referen-

dum, such Act or law or part or parts thereof so disapproved shall, at the end of 30 days, after the Clerk of the Executive Council shall have published in the Manitoba Gazette a statement of the result of the vote on such Act or law, or part or parts thereof, become and be deemed repealed."

Sect. 7 of the proposed Act, while preserving the power of veto and disallowance by the Governor-General provided for by ss. 55 and 90 of the Act of 1867, dispensed with the assent of the Lieutenant-Governor provided for by ss. 56 and 90 of that Act; even if s. 7 was not intended to dispense with that assent, s. 11 clearly did so. The proposed Act also violated the provisions of s. 54 (in conjunction with s. 90) as to money bills.

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On the application of the Attorney-General of the Province special leave to appeal to His Majesty in Council was granted.

1919. May 15, 16. *Maugham K.C.* and *Horace Douglas* for the appellant. The Legislature of Manitoba had power to pass the Act now in question under s. 92, head 1 of the British North America Act, 1867. Upon the true construction of the Act the office or powers of the Lieutenant-Governor, as representing the Crown, are not interfered with. The Act should be construed ut valeat majus quam pereat. Although ss. 7 and 11 do not expressly reserve the discretionary power of the Lieutenant-Governor, they should be read as impliedly so doing. Sect. 4 (A) shows that it was not intended to enact anything which was ultra vires. If upon the necessary construction of any part of the Act the rights of the Lieutenant-Governor are interfered with, that part of the Act is severable and the residue is valid under s. 2 of the Colonial Laws Validity Act, 1865. There is no reason why the power given to the Legislature by s. 92, head 1 to amend the constitution should not be exercised by providing a different machinery for enacting laws, subject to the rights of the Crown. [Reference was made to *Hodge v. The Queen*. (1)]

Sir John Simon K.C. and *Hon. M. Macnaghten K.C.* for the respondent, and *Hon. F. Russell K.C.* and *T. Mathew* for the Attorney-General for Canada, were not called upon.

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July 3. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. In this case questions were raised in the province of Manitoba as to the validity of an Act passed by its Legislature and entitled the Initiative and Referendum Act. In consequence, under a statute which

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enabled him to do so, the Lieutenant-Governor in Council referred to the Court of King's Bench of the province the two questions which follow: 1. Had the Legislative Assembly jurisdiction to enact the said Act, and, if not, in what particular or respect has it exceeded its powers? 2. Had the Legislative Assembly jurisdiction to enact ss. 3, 4, 4A, 7, 8, 11, 12, 17, sub-s. 1, of the said Act, or any of them; and, if so, which of them?

On October 27, 1916, these questions came before Mathers C.J. By consent there was no argument, and the learned judge decided that the Legislative Assembly had jurisdiction to pass the Act and the several sections referred to in the second question.

The matter was then brought before the Court of Appeal of the province, and was argued before Howell C.J., and Richards, Perdue, Cameron and Haggart JJ.A. On December 20, 1916, the Court of Appeal delivered judgment, answering the questions submitted in the negative. The answer to the first question was: "No. The particulars in which the Legislative Assembly exceeded its powers are set forth in the several reasons for judgment delivered by members of the Court and forwarded herewith." The answer to the second question was: "As to ss. 3, 4, 4A, 7, 9 and 11 the answer is 'No.' As to s. 12 and s. 17, sub-s. 1, the answer is, 'Taken with their context, No.' "

In October, 1918, special leave was granted by His Majesty in Council to the Attorney-General of the province to appeal to the Sovereign in Council, and by Order dated November 25 in the same year leave was granted to the Attorney-General of Canada to intervene.

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It would have been a convenient course if, before bringing these questions before the Sovereign in Council, the authorities of the province had seen their way in the first place to submit them for the opinion of the Supreme Court of Canada. It is desirable that topics affecting the Constitution of Canada should come before that Court before being brought to London for argument. However, the parties appear to have concurred in asking that special leave for a direct appeal should be granted. Their Lordships desire to observe that it is by no means a matter of course that such leave should be given, for they attach much importance, not only to the position which belongs

to the Supreme Court under the Constitution of Canada, but to the value, in the decision of important points such as those before them, of the experience and learning of the judges of that Court. However, the Attorney-General of the province has succeeded in obtaining special leave to bring the case directly before the Judicial Committee, and their Lordships will therefore deal with it. They will only observe further at this stage that they have derived much assistance from the judgments delivered by the members of the Court of Appeal for Manitoba.

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The validity of the Initiative and Referendum Act, a statute of a type which is not unknown in parts of the world with constitutions different from that of Canada, of course depends on whether the Constitution of Canada as defined by the British North America Act of 1867 permitted a Provincial Legislature to pass it into law for the Province. The first step in the consideration of the matter is therefore to ascertain the exact character of the legislation proposed. In substance it is this. The Legislative Assembly seeks to provide that laws for the Province may be made and repealed by the direct vote of the electors, instead of only by the Legislative Assembly whose members they elect. The machinery created for the accomplishment of this end is that first of all a number of the electors, being not less than eight per cent. of the number of votes polled at the last election, may by petition submit a proposed law to the Legislative Assembly. In the next place, the proposed law, unless enacted without substantial change by the Assembly in the session in which it is submitted, must be submitted by the Lieutenant-Governor in Council to a vote of the electors, to be taken at the next general Provincial election, unless a special referendum vote has been asked for in the petition. Provision is made for time being available in which to obtain the opinion of the Attorney-General, and if necessary of the Court, as to whether the proposed law is *intra vires*. If not it cannot be submitted. If a special referendum vote has been asked for it is usually to be taken within six months from the presentation of the petition. In the third place, if a proposed law has been submitted to the electors, and approved by a majority of the votes polled, it is to take effect, "subject, however, to the same powers of veto and disallowance as are provided in the British North America Act or as exist in law with

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respect to any Act of the Legislative Assembly, as though such law were an Act of the said Assembly," on a date to be proclaimed by the Lieutenant-Governor, and to be not later than thirty days after the official announcement of the result of the vote.

The proposed law further provides that a number of electors, equivalent in this case to not less than five per cent. of the number of votes polled at the last election, may petition for the repeal of any Act of the Assembly or of any law enacted by the new method, the validity of which is now in question, and provisions, not differing in material respects from these already referred to, are made for the repeal of such Act or law. There are in the Initiative and Referendum Act other provisions which may be mentioned briefly. No Act of the Legislative Assembly is to take effect until three months after the end of the session in which it was passed, unless in a preamble voted for by two-thirds of the members voting, the Act has been declared to be an emergency measure, but this is not to apply to a Supply Bill or Appropriation Act, except as to items for capital expenditure exceeding \$100,000. When a vote is to be taken under the Act the Lieutenant-Governor is to order the issue of writs in His Majesty's name for taking such vote, and he is also to provide for the public dissemination of information and arguments on the matters referred, not exceeding twelve hundred words for each side.

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The framework of the Constitution of Canada was enacted in 1867 by the Imperial Parliament in order to give effect to the desire expressed in the Resolutions adopted by the Conference of Canadian and other delegates held at Quebec in October, 1864. The object was to form in the first instance out of the old Province of Canada, along with Nova Scotia and New Brunswick, a Dominion with a constitution similar in principle to that of the United Kingdom. Provision was made for the extension of this Constitution to other colonies, such as Newfoundland and Prince Edward Island, should they desire to come in, and also to Ruperts Land and the North-Western Territory. It is out of these last that the Province of Manitoba was formed, the provisions of the Act of 1867 that are applicable having been meantime strengthened by subsequent Imperial and Dominion legislation. The Executive Government of Canada was declared by the Act of 1867 to remain vested

in the Queen, and, by s. 12, all powers, authorities and functions vested in or exercisable by the Governors or Lieutenant-Governors of the Provinces brought into confederation were, so far as the same continued in existence and were capable of being exercised after the Union in relation to the Government of Canada, to be vested in and exercisable by the Governor-General. A Parliament was then set up for Canada. Part V. of the Act established analogous Constitutions for the Provinces. For each of these there was to be a Lieutenant-Governor. Although he is under s. 58 appointed by the Governor-General, it has been settled by decisions of the Judicial Committee, such as that in *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick* (1), that, as the appointment of a Provincial Governor is made under the Great Seal of Canada, and therefore really by the Executive Government of the Dominion which is in the Sovereign the Lieutenant-Governor is as much the representative of His Majesty for all purposes of Provincial Government as is the Governor-General for all purposes of Dominion Government. Sect. 65 and the other sections dealing with the subject define the powers of the Lieutenant-Governor as being such of those powers having been exercisable by the Governors or Lieutenant-Governors of the Provinces brought into Confederation, as are exercisable in relation to the Government of a Province. The scheme of the Act passed in 1867 was thus, not to weld the Provinces into one, nor to subordinate Provincial Governments to a central authority, but to establish a central government in which these Provinces should be represented, entrusted with exclusive authority only in affairs in which they had a common interest. Subject to this each Province was to retain its independence and autonomy and to be directly under the Crown as its head. Within these limits of area and subjects, its local Legislature, so long as the Imperial Parliament did not repeal its own Act conferring this status, was to be supreme, and had such powers as the Imperial Parliament possessed in the plenitude of its own freedom before it handed them over to the Dominion and the Provinces, in accordance with the scheme of distribution which it enacted in 1867.

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(1) [1892] A.C. 437.

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The importance of bearing this in mind when construing the subsequent provisions of the British North America Act will presently appear. After thus defining the executive power the statute goes on to provide for a Legislature for each Province, and concludes Part V. by declaring in s. 90 that what has been laid down as to the Dominion Parliament in regard to Appropriation and Money Bills, the recommendation of money votes, the assent to Bills, the disallowance of Acts, and the signification of pleasure on Bills reserved, is to extend and apply to the Legislatures of the several Provinces as if these provisions were re-enacted and made applicable in terms to the respective Provinces and their Legislatures, with the substitution of the Lieutenant-Governor of the Province for the Governor-General, of the Governor-General for the Sovereign and for a Secretary of State and of one year for two years, and of the Province for Canada.

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The Act then, by two well-known sections, 91 and 92, distributes the powers of legislation which it confers between the Dominion Parliament and the Provincial Legislatures. Nothing in s. 91, which relates to Dominion powers, affects the question under consideration, excepting in one important respect. The residuary power of legislation, beyond those powers that are specifically distributed by the two sections, is conferred on the Dominion. Had the Provinces possessed the residuary capacity, as in the case with the States under the Constitutions of the United States and Australia, this might have affected the question of the power of their Legislatures to set up new legislative bodies. But it is not so, and it is therefore unnecessary to pursue a point which is merely speculative. The language of s. 92 is important. That section commences by enacting that "in such Province the Legislature may exclusively make laws in relation to matters" coming within certain classes of subjects. The only one of these classes which is relevant for the present purpose is the first enumerated, "the amendment from time to time, notwithstanding anything in this Act, of the Constitution of the Province, excepting as regards the office of Lieutenant-Governor."

The references their Lordships have already made to the character of the office of Lieutenant-Governor, and to his position as directly representing the Sovereign in the province, renders natural the exclusion of his office from the

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power conferred on the Provincial Legislature to amend the constitution of the Province. The analogy of the British Constitution is that on which the entire scheme is founded, and that analogy points to the impropriety, in the absence of clear and unmistakable language, of construing s. 92 as permitting the abrogation of any power which the Crown possesses through a person who directly represents it. For when the Lieutenant-Governor gives to or withholds his assent from a Bill passed by the Legislature of the province, it is in contemplation of law the Sovereign that so gives or withholds assent. Moreover, in accordance with the analogy of the British Constitution which the Act of 1867 adopts, the Lieutenant-Governor who represents the Sovereign is a part of the Legislature. This is in terms so enacted in such sections as s. 69, the principle of which has been applied to Manitoba by s. 2 of the Dominion Statute of 1870, which formed the new Province out of Rupert's Land and the North-Western Territory, and established it with the Constitution provided by the Act of 1867. It follows that if the Initiative and Referendum Act has purported to alter the position of the Lieutenant-Governor in these respects, this Act was in so far *ultra vires*.

Their Lordships are of opinion that the language of the Act cannot be construed otherwise than as intended seriously to affect the position of the Lieutenant-Governor as an integral part of the Legislature, and to detract from rights which are important in the legal theory of that position. For if the Act is valid it compels him to submit a proposed law to a body of voters totally distinct from the Legislature of which he is the constitutional head, and renders him powerless to prevent it from becoming an actual law if approved by a majority of these voters. It was argued that the words already referred to, which appear in s. 7, preserve his powers of veto and disallowance. Their Lordships are unable to assent to this contention. The only powers preserved are those which relate to Acts of the Legislative Assembly, as distinguished from Bills, and the powers of veto and disallowance referred to can only be those of the Governor-General under s. 90 of the Act of 1867, and not the powers of the Lieutenant-Governor, which are at an end when a Bill has become an Act. Sect. 11 of the Initiative and Referendum Act is not less difficult to reconcile with the rights of the Lieutenant-Governor. It provides that when

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a proposal for repeal of some law has been approved by the majority of the electors voting, that law is automatically to be deemed repealed at the end of thirty days after the clerk of the Executive Council shall have published in the *Manitoba Gazette* a statement of the result of the vote. Thus the Lieutenant-Governor appears to be wholly excluded from the new legislative authority.

These considerations are sufficient to establish the ultra vires character of the Act. The offending provisions are in their Lordships' view so interwoven into the scheme that they are not severable. The Colonial Laws Validity Act, 1865 (1), therefore, which was invoked in the course of the argument, does not assist the appellants.

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Having said so much, their Lordships, following their usual practice of not deciding more than is strictly necessary, will not deal finally with another difficulty which those who contend for the validity of this Act have to meet. But they think it right, as the point has been raised in the Court below, to advert to it. Sect. 92 of the Act of 1867 entrusts the legislative power in a Province to its Legislature, and to that Legislature only. No doubt a body, with a power of legislation on the subjects entrusted to it so ample as that enjoyed by a Provincial Legislature in Canada, could, while preserving its own capacity intact, seek the assistance of subordinate agencies, as had been done when in *Hodge v. The Queen* (2), the Legislature of Ontario was held entitled to entrust to a Board of Commissioners authority to enact regulations relating to taverns; but it does not follow that it can create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence. Their Lordships do no more than draw attention to the gravity of the constitutional questions which thus arise.

They have already indicated that on the point considered earlier in this judgment they are of opinion that the first part of the first question submitted for judicial decision, that relating to the jurisdiction to pass the Act, must be answered in the negative. As to the second part of this question and as to the second question submitted which covers the same ground, namely, whether the Legislative

(1) 28 & 29 Vict. c. 63.

(2) 9 App. Cas. 117.

Assembly could enact ss. 3, 4, 4A, 7, 9, 11, 12 and 17 (sub-s. 1), or any of them, they agree with the Court of Appeal, subject to a reservation as to s. 12, in thinking that none of them were validly enacted, for they were merely steps towards the accomplishment of a purpose that was ultra vires. As to s. 12, if the last sentence were omitted they think that the main part of this might be made a subject of valid enactment. The earlier part of the section is severable, and if it had been capable of interpretation apart from the title of the Act and its context, it could have been validly enacted. But it is obvious that this provision was introduced where it stands in the midst of a number of other sections as preparatory to the accomplishment of ultra vires purposes.

It may well be, therefore, that the Court of Appeal was right in refusing to look at it apart from the rest of the sections, the purposes of which it was put in to subserve. Their Lordships think it unnecessary to decide a point which the appellants did not raise as a separate one at the Bar, and which has no relation to the real topic of controversy, or to interfere with the conclusion come to by the judges in the court below.

They will humbly advise His Majesty that the questions submitted should be answered in the terms indicated. There will be no order as to costs. The appeal should be simply dismissed.

Solicitors for appellant: *Lawrence Jones & Co.*

Solicitors for respondents: *Blake & Redden.*

Solicitors for intervenant: *Charles Russell & Co.*

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[PRIVY COUNCIL.]

WORKMEN'S COMPENSATION BOARD. APPELLANTS;

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RESPONDENTS.

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p. 184.ON APPEAL FROM THE COURT OF APPEAL OF BRITISH
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Canada (British Columbia)—Legislative Power of Province—Workmen's Compensation Act (Brit. Col., 6 Geo. 5, c. 77), Pt. I., s. 8 (b)—Ship—Seaman—Residence within Province—Accident outside Province—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60, Imp.), s. 503—Canada Shipping Act (R. S. Can., 1906, c. 113), s. 215—British North America Act, 1867 (30 & 31 Vict. c. 3, Imp.), s. 92, head 13.

The respondent company was incorporated by a Dominion statute and owned a steamship which plied between ports in British Columbia and ports in the United States. The steamship sank with all hands in waters outside British territory. Under Pt. I. of the Workmen's Compensation Act of British Columbia (R. S. B. C., 1916, c. 77) compensation was payable by the appellant Board out of an accident fund thereby established to the dependents (whether resident in the Province or not) of drowned seamen who had been engaged while resident in the Province. The respondents by the Act were contributors to the fund on the basis of the pay roll of their employees who were within the scope of the Act:—

Held, that the provisions of the Workmen's Compensation Act whereby the compensation was payable were intra vires the Provincial Legislature; that they did not derogate from the respondents' right to limit their liability under s. 503 of the Merchant Shipping Act, 1894 (Imp.); and were not inconsistent with the provisions of s. 215 of the Canada Shipping Act (R. S. Can., 1906, c. 113) with regard to the duty of the owner of a Canadian foreign sea-going ship towards injured seamen.

Judgment of the Court of Appeal reversed.

APPEAL from a judgment of the Court of Appeal of British Columbia (May 2, 1919) affirming the judgment of Clement J.

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The action was brought in the Supreme Court of British Columbia by the respondents, the owners of the steamship *Princess Sophia*, substantially for an injunction restraining the appellant Board from paying compensation under the Workmen's Compensation Act of British Columbia (Brit. Col. 6 Geo. 5, c. 77) to the dependents of members of the crew of that steamship, which was lost with all hands in waters outside British territory. The respondents were incorporated under a Dominion statute and had their head

* *Present*:—LORD BIRKENHEAD L.C., VISCOUNT HALDANE, LORD BUCKMASTER, LORD PARMOOR, and MR. JUSTICE DUFF.

office at Montreal. The ship plied between ports in British Columbia and ports in the United States, and the members of the crew in question resided in British Columbia.

The material statutory provisions, of which s. 8 (b) of the Workmen's Compensation Act was more particularly relevant, appear from the judgment of their Lordships.

The trial Judge, Clement J., held that the Workmen's Compensation Act, in so far as it applied to accidents happening outside the Province of British Columbia, was ultra vires the Provincial Legislature since it dealt with or derogated from civil rights outside the Province; he enjoined the appellant board from paying the compensation.

The Court of Appeal affirmed the decision, McPhillips J.A. dissenting.

1919. July 10, 12. *S. S. Taylor K.C.* and *J. B. N. de Farris K.C.* for the appellants. The material provisions of the Workmen's Compensation Act are intra vires the Provincial Legislature under s. 92 of the British North America Act, 1867. They come within head 2 as direct taxation within the Province for provincial purposes, equally with the imposition of poor rates or school rates. The fund is in the nature of a state insurance for the benefit of workmen resident in the Province. Sect. 48 treats the fund as forming part of the revenue of the Province. The provisions are also in relation to property and civil rights within the Province within head 13. They give a right against a fund within the Province, and prescribe the conditions upon which workmen therein resident are to be employed. It is not material that the accident which gave rise to the claim happened outside the Province. [Reference was made to *Hodge v. The Queen* (1) and *Attorney-General of Manitoba v. Manitoba Licence Holders' Association*. (2)]

Royal Bank of Canada v. The King (3), upon which reliance was placed in the judgments, is not in point; there the Act was in derogation of a specific civil right against a fund outside the Province. The question of the validity of the provisions must be considered solely in reference to the facts of the case: *John Deere Plow Co. v. Wharton*. (4) The Act in no way conflicts with any right which the respondents

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(1) (1883) 9 App. Cas. 117, 132.

(2) [1902] A.C. 73.

(3) [1913] A.C. 283.

(4) [1915] A.C. 330, 338.

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had to limit their liability under s. 503 of the (Imperial) Merchant Shipping Act, 1894. That section deals with an entirely different subject—namely, damages.

E. P. Davis K.C. and *Tilley K.C.* for the respondents. The Workmen's Compensation Act, in so far as it applies to accidents happening outside the Province of British Columbia, affects civil rights outside the Province; it is to that extent ultra vires the provincial Legislature. The Act takes away the immunity which the employer has if the accident happens in a place where no local law of compensation exists. Sect. 8 (b) applies to a workman who is resident within the Province when the accident happens, but who when engaged was not so resident; consequently the immunity which the employer acquires by a contract with the workman outside the Province is taken away by s. 12 which prohibits contracting out. Legislation which necessarily affects civil rights outside the Province is ultra vires a Provincial Legislature: *Royal Bank of Canada v. The King*. (1) The right given to the workman is in substance a right against the employer. The Act is not one in relation to taxation for the raising of money for provincial purposes. The matter dealt with is not general so as to be taxation, but affects only certain classes of employers and their workmen; the workman has no claim against the Government, only against the fund. The "dependents," under s. 2, may all be persons not resident in the Province; a payment to them in that case cannot be a Provincial purpose. [Reference was also made to *Bank of Toronto v. Lambe* (2), *Canadian Pacific Ry. v. Corporation of the Parish of Notre Dame of Bonsecours* (4), *Canadian Pacific Ry. Co v. Parent*. (5)] Further, the material provisions of the Act are inconsistent with s. 503 of the Merchant Shipping Act, 1894 (Imp.), and cannot be worked in harmony with that section. They are consequently ultra vires. The British Workmen's Compensation Act, 1906, by s. 7, sub-s. 1 (f), expressly provides that that enactment is notwithstanding s. 503, thus showing that there is a conflict. The word "damages" in s. 503 is used in a broad sense, and covers compensation payable as a result of an accident. The decision of the Supreme Court of the United States in

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(1) [1913] A.C. 283.
(2) (1887) 12 App. Cas. 575.

(3) [1899] A.C. 367.
(4) [1917] A.C. 195, 206.

Southern Pacific Ry. Co. v. Jensen (1) is directly applicable. There is also a conflict with s. 215 of the Canada Shipping Act (R. S. Can., 1906, c. 113).

S. S. Taylor K.C. in reply referred, as to s. 503, to *The Ettrick* (2), *The Hector* (3), and *The Warkworth*. (4)

Aug. 5. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. This is an appeal from a judgment of the Court of Appeal of British Columbia dismissing, McPhillips J.A. dissenting, an appeal from the judgment of Clement J. in an action. That judgment declared that the enactment of the Workmen's Compensation Act of the Province, in so far as it purported to warrant the payment of compensation by the defendants, who are the appellants here, to the dependents of certain members of the crew of the steamship *Princess Sophia*, which foundered with all hands in waters outside British territory on a return journey from Skagway in Alaska to Vancouver, was ultra vires of the Legislature of the Province. By the judgment an injunction was also granted. The respondents are a railway company incorporated by Dominion statute. Their line runs through several Provinces, including British Columbia, and they own and operate steam vessels sailing between ports in that Province and ports in the territory of the United States. The appellant Board, of which the other appellants are the members, is a body corporate constituted by the Workmen's Compensation Act referred to, for the purpose of administering the Act. The members of the crew who were lost, and to whose dependents the appellant board claims the right to pay compensation, were engaged within the Province to do work and perform services which in part had to be done and performed within the Province.

It will be convenient in the first place to turn to the provisions of the Act in question. It was passed in 1916, and its primary purpose is to confer on workmen, out of an accident fund which it established, compensation for personal injury by accident arising out of and in course of their employment. The right of the workman does not, so far as Part I. of the Act, with which alone their Lordships are concerned in this case, applies, depend on negligence on

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(1) (1916) 244 U.S. 205, 217, 255.
(2) (1881) 6 P.D. 127.

(3) (1883) 8 P.D. 218.
(4) (1884) 9 P.D. 145.

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the part of the employer, as in ordinary employers' liability legislation, but arises from an insurance by the Board against fortuitous injury. The insurance money is not, as in the case of the British Workmen's Compensation Act of 1906, to be paid by the employer directly, but is provided by the Board from a fund which it collects from certain groups of employers generally. Part II. of the Act is separate, and deals with employers' liability of the ordinary type, as a different subject.

The Act defines dependents as meaning such members of the family of a workman as were dependent on his earnings at the time of his death or incapacitation, and no person is to be excluded as a dependent because he is a non-resident alien. Employer is defined to mean any person having in his service under a contract of hiring or apprenticeship any person engaged in any work in or about an industry. Part I. is applied by s. 4 to employers and workmen (other than persons casually employed) in a large number of enumerated industries, including railways and shipping. Sect. 6 enacts that the compensation is to be paid by the board out of the accident fund.

Sect. 8 is important for the present purpose. It provides (sub-s. 1) that where an accident happens while the workman is employed elsewhere than in the Province which would give a title to compensation if it had happened in the Province, he or his dependents are to be so entitled—(a) if the place of business of the employer is situate in the Province and the residence and the usual place of employment are within it, and the employment out of the Province has immediately followed the employment by the same employer within it and has lasted less than six months; or (b) if the accident happens on a steamship, ship, or vessel, or on a railway, and the workman is a resident of the Province, and the nature of the employment is such that in the course of the work or service which the workman performs it is required to be performed both within and without the Province. (2.) Except as provided by sub-s. 1 no compensation is to be payable under Part I. of the Act where the accident happens elsewhere than in the Province. (3.) In any case where compensation is payable in respect of an accident happening elsewhere than in the Province, if the employer has not fully contributed to the accident fund in respect of all the wages of workmen in his employ

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who are engaged in the employment or work in which the accident happens, the employer shall pay to the board the full amount of capitalized value, as determined by the board, of the compensation payable in respect of the accident, and the payment of such amount may be enforced in the same manner as the payment of an assessment may be enforced.

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By s. 9, where by the law of the country where the accident happens the workman or his dependents are entitled to compensation in respect of it, they are put to their election between claiming under that law or under Part I. of the Act. Under s. 10 the Board is subrogated to the rights of the workman or dependent against persons other than the employer if compensation is claimed under Part I., and the workman is debarred from bringing an action against an employer in case of his claiming compensation under Part I. Sect. 11 substitutes the provision made under that part for all common law or statutory rights of action against the employer in respect of accident.

Sects. 15 to 24 provide for the scale of the compensation. Sect. 25 classifies the industries to be assessed for the maintenance of the accident fund into groups, one of which includes the respondent railway company nominatim. By s. 28 each employer is to furnish to the board an estimate of the probable amount of the pay-roll of each of his industries for the following year, but in computing the amount regard is to be had only to such portion of the pay-roll as represents workmen and employment within the scope of Part I.

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Sect. 29 directs the Board to create and maintain the accident fund by assessing the employers in each class according to the payrolls. The assessments may be general, as applicable to any class or sub-class, or special, as applicable to any industry. By s. 30 every employer assessed is to retain from the wages of each workman a cent a day as a contribution towards medical aid, and to pay the amount to the Board. By s. 31 the Government of the Province may contribute to the accident fund an annual sum not exceeding fifty thousand dollars. By s. 51 the Board is given power to inspect premises and to introduce regulations and safeguards for the prevention of accidents.

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It is not in dispute that the persons employed by the respondent company with reference to whose dependents the present question is raised, come within the conditions under which the enactment purported to be applicable to them. Nor can it be successfully contended that the Province had not a general power to impose direct taxation in this form on the respondents if for provincial purposes. In *Bank of Toronto v. Lambe* (1) it was decided by the Judicial Committee that a Province could impose direct taxes in aid of its general revenue on a number of banks and insurance companies carrying on business within the Province, and none the less that some of them were, like the respondents, incorporated by Dominion statute. The tax in that case was not a general one, and it was imposed, not on profits nor on particular transactions, but on paid-up capital and places of business. The tax was held to be valid, notwithstanding that the burden might fall in part on persons or property outside the province.

It is, however, argued for the respondents that the Act is ultra vires in other respects. It is said that the purpose is not a provincial one, inasmuch as it is to insure the dependents against accidents to the workmen which may happen, as in the present case, outside the limits of the Province. But in their Lordships' opinion this is not a case in which it is sought to enact any law giving a right to arise from a source outside the Province. The right conferred arises under s. 8, and is the result of a statutory condition of the contract of employment made with a workman resident in the province, for his personal benefit and for that of members of his family dependent on him. Where the services which he is engaged to perform are of such a nature that they have to be rendered both within and without the Province, he is given a right which enures for the benefit of himself and the members of his family dependent on him, not the less that the latter may happen to be non-resident aliens. This right arises, not out of tort, but out of the workman's statutory contract, and their Lordships think that it is a legitimate provincial object to secure that every workman resident within the Province who so contracts should possess it as a benefit conferred on himself as a subject of the Province. When he enters into this contract, it also

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appears to them to be within the power of the Province to enact that, if the employer does not fully contribute to the accident fund out of which the payment is normally to be made, the employer should make good to that fund the amount required for giving effect to the title to compensation which the workman acquired for himself and his dependents. The scheme of the Act is not one for interfering with rights outside the Province. It is in substance a scheme for securing a civil right within the Province. The case is wholly different from that from Alberta which was before the judicial committee in *Royal Bank of Canada v. The King* (1), where it was held that the Provincial statute was inoperative in so far as it sought to derogate from the rights of persons outside the Province of Alberta who had subscribed money outside it to recover that money from depositaries outside the Province with whom they had placed it for the purposes of a definite scheme to be carried out within the Province, on the ground that by the action of the Legislature of Alberta the scheme for which alone they had subscribed had been altered. The rights affected were in that case rights wholly outside the Province; here the rights in question are the rights of workmen within British Columbia. It makes no difference that the accident insured against might happen in foreign waters. For the question is not whether there should be damages for a tort, but whether a contract of employment made with persons within the Province has given a title to a civil right within the Province to compensation. The compensation, moreover, is to be paid by the Board and not by the individual employer concerned. No doubt for some purposes the law sought to be enforced affects the liberty to carry on its business of a Dominion railway company to which various provisions of s. 91 of the British North America Act of 1867 apply. But for other purposes, with which the Legislature of British Columbia had jurisdiction to deal under s. 92, it was competent to that Legislature to pass laws regulating the civil duties of a Dominion railway company which carried on business within the Province, and in the course of that business was engaging workmen whose civil rights under their contracts of employment had been placed by the Act of 1867 within the jurisdiction of the province.

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It was further contended for the respondents that s. 503 of an Imperial statute, the Merchant Shipping Act, 1894, invalidated the provision in question made by the provincial Legislature, on the ground that the Imperial statute had conferred a civil right from which the Province could not derogate. Upon this they desire to point out that whether the expression "damages" in the section applies to a liability such as that under consideration, a liability not of the shipowner, but of the Board, is more than doubtful. For the taxation complained of in the present case is imposed with the object of establishing an institution which shall provide insurance benefits for persons whose contract of employment arises within the Province, and it is not directed to the very different purpose of making the employer directly compensate his workman by way of damages for injury arising out of what has not the less to be proved as a tort because it may have happened, in the language of s. 503, without his actual fault or privity.

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It was also argued that s. 215 of the Canada Shipping Act, passed by the Dominion Parliament and forming ch. 113 in the Revised Statutes of 1906, was inconsistent with the right of the Province to legislate as it has done. That section provides that if the master or any seaman or apprentice of any Canadian foreign sea-going ship receives injury in the service of his ship, the owner is to defray inter alia the expense of providing the necessary surgical and medical advice, with attendance, medicines, and subsistence, until the person injured is cured or dies, or is brought back to a home port. The only observation which it is necessary to make about this section is that it does not purport to cover the same field as does the British Columbia statute. It may conceivably give rise under that statute to particular questions of election. There are no materials before their Lordships upon which they can pronounce on this point, but it in no way renders ultra vires the scheme of the statute under consideration.

For these reasons their Lordships will humbly advise His Majesty that the judgment appealed from should be reversed, that the action should be dismissed, and that the appellants should have their costs of this appeal, and in both Courts below.

Solicitors for appellants: *White & Leonard.*

Solicitors for respondents: *Blake & Redden.*

[PRIVY COUNCIL.]

TRUSTEES OF THE ROMAN
CATHOLIC SEPARATE SCHOOLS
FOR THE CITY OF OTTAWA

APPELLANTS;

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AND

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THE QUEBEC BANK AND OTHERS. RESPONDENTS;

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ATTORNEY-GENERAL FOR
ONTARIO.

INTERVENER.

ON APPEAL FROM THE SUPREME COURT OF ONTARIO.

Canada (Ontario)—Legislative Power—Separate Schools—Application of Funds by invalid Commission—Validation by Statute—British North America Act, 1867 (30 & 31 Vict. c. 3), s. 93, sub-s. 1.

The appellants, the trustees for the Roman Catholic schools in Ottawa, elected under 26 Vict. c. 5 (Upper Canada), having refused to conduct the schools according to regulations validly made by the Education Department, the Legislature of Ontario, by 5 Geo. 5, c. 45, purported to authorize the appointment of Commissioners to take over the management of the schools. The Commissioners were appointed and carried on the schools from July, 1915, until November, 1916, when the statute 5 Geo. 5, c. 45, was declared by the Privy Council to be invalid. For the purposes of the schools the Commissioners drew and expended money standing to the credit of the appellants with bankers and incurred liabilities to bankers. By a statute of the Legislature of Ontario, 7 Geo. 5, c. 60, it was declared that the expenditure was to be deemed to have been made for and at the request of the appellants and that the liabilities were to be the liabilities of the appellants:—

Held, that the statute 7 Geo. 5, c. 60, was not invalid under the British North America Act, s. 93, sub-s. 1, as prejudicially affecting any right or privilege with respect of the schools which the appellants had by law.

APPEAL from a judgment of the Supreme Court of Ontario, Appellate Division (October 24, 1918), varying the judgment of Clute J.

The appellants brought against the respondents separate actions consolidated before trial, which raised the question whether an Act of the Legislature of Ontario, 7 Geo. 5, c. 60, was, as the appellants contended, ultra vires having regard to s. 93, sub-s. 1, of the British North America Act (30 & 31 Vict. c. 3). (1) The terms of the Ontario statute in question

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* *Present*:—VISCOUNT HALDANE, LORD BUCKMASTER, LORD DUNEDIN, and MR. JUSTICE DUFF.

(1) British North America Act, 1867 (30 & 31 Vict. c. 3), s. 93, sub-s. 1: "Nothing in any such law shall prejudicially affect any right or

privilege with respect to denominational schools which any class of persons have by law in the province at the Union."

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and the circumstances in which it was passed appear from the judgment of their Lordships.

The Appellate Division, varying the judgment of the trial Judge (Clute J.), held that the statute was valid; the actions were accordingly dismissed and judgment was given for the respondents, the Bank of Ottawa, upon a counterclaim for a sum of 71,891 dollars advanced by that bank to the Commission. The appeal to the Appellate Division is reported at 43 Ont. L. R. 637.

1919. July 28, 29. *Sir John Simon K.C.* and *N. A. Belcourt K.C.* for the appellants. Apart from the statute 7 Geo. 5, c. 60 (Ont.), the appellants were entitled to succeed in the action. That statute was ultra vires having regard to s. 93, sub-s. 1, of the British North America Act, 1867. It was ultra vires the Legislature under that subsection to authorize the Commission to deal with the school funds: *Ottawa Separate Schools Trustees v. Ottawa Corporation* (1); that being so, it was ultra vires to ratify the acts of the Commission. The appellants were entitled under the Separate School Act to administer the funds themselves, and to reclaim the funds from the hands of any unauthorized holder. Those rights were prejudicially affected by the Act now in question, within the meaning of s. 93, sub-s. 1.

Tilley K.C. for the respondents, and *McGregor Young K.C.* for the intervener, were not called upon to argue.

Oct. 23. The judgment of their Lordships was delivered by

LORD DUNEDIN. The present case is what it is to be hoped is the last chapter of the history of the unfortunate disagreement between the Board of the Roman Catholic Schools and the educational authority of the city of Ottawa. This matter has already been before this Board in the two cases of *Ottawa Separate Schools Trustees v. Mackell* (2) and *Ottawa Separate Schools Trustees v. Ottawa Corporation*. (1) It is unnecessary to state on this occasion the system under which the Catholic schools are maintained, as that is set out at length in those judgments. It is sufficient to say that it was decided in the former case that a regulation of the education authority prescribing the use of English in the schools was not ultra vires as infringing the provision of

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s. 93, sub-s. 1, of the British North America Act, 1867; while in the latter it was held that an Act of the Legislature of Ontario appointing a Commission to take over the schools and supersede the board was ultra vires as infringing the said provision.

The Commission was in occupation of the schools theretofore managed by the appellants from July 26, 1915, till November following, when, upon the above second-mentioned judgment being pronounced, they gave up possession to the appellants. During the régime of the Commission the schools were carried on by them. In order to meet the expenses of the schools the Commission besides levying a half year's rate took a sum of 97,000 dollars odd standing at the credit of the appellants on an account in their name with the Quebec Bank. They also incurred a liability of 71,000 dollars odd to the Bank of Ottawa.

These actions were raised by the appellants against the Quebec Bank, the Bank of Ottawa and certain individual members of the Commission. There was claimed against the Quebec Bank the said sum of 97,000 dollars odd, against the Bank of Ottawa a sum of 37,000 dollars odd which had been transferred to it out of the 97,000 dollars and kept as a sinking fund to meet certain debentures issued by the Board, and against the Commissioners the sum of 84,000 dollars odd, being the produce of the half year's rate above referred to. These actions were consolidated. Pending these actions the Legislature of Ontario passed the statute of 7 Geo. 5, c. 60, which is as follows:—

“Whereas pursuant to an Act respecting the Board of Trustees of the Roman Catholic Separate Schools of the City of Ottawa passed in the fifth year of the reign of His Majesty, King George Fifth, chapter 45, the Minister of Education with the approval of the Lieutenant-Governor in Council on July 20, 1915, appointed a Commission consisting of Denis Murphy, now deceased, Thomas D'Arcy McGee and Arthur Charbonneau herein referred to as ‘the Commissioners’ to conduct and manage the Roman Catholic Separate Schools of the City of Ottawa, which said Act has been declared to be ultra vires; and whereas the Board of Trustees of the said Separate Schools prior to the appointment of the said Commission had neglected

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and failed to open, keep open, maintain and conduct the said schools according to law and to provide qualified teachers therefor, had threatened at various times to close the said schools and had neglected and refused to discharge and perform the duties imposed upon it by law to the loss and damage of the supporters of the said schools and to the serious prejudice of the children entitled to attend the same; and whereas by reason of the neglect and default of the Board as aforesaid it was necessary to provide special means for the education of the children entitled to attend the said schools until the Board should be willing to perform its lawful duties in respect to said schools, and the Commissioners were appointed for that purpose; and whereas the Commissioners entered into possession of the school premises and property on July 26, 1915, and thereafter maintained and conducted the said schools continuously until the said Act was declared to be ultra vires, during the whole of which time the said Board was unwilling to conduct the said schools according to law; and whereas the Commissioners in carrying on said schools and meeting obligations of the Board disbursed \$68,873.43 which at the date of their appointment stood to the credit of the Board in the Quebec Bank of Ottawa, the further sum of \$84,156.04 received out of Court pursuant to an Order of the Appellate Division of the Supreme Court of Ontario, dated April 3, 1916, and the further sum of \$71,944.08 received from other sources, all of which sums of money were by law applicable to the maintenance and conduct of the said schools; and the Commissioners in the maintenance conduct and management of the said schools, also incurred a liability to the Bank of Ottawa for \$71,891.16 and interest thereon which still remains unpaid; and whereas the Board has commenced actions against the Quebec Bank, the Bank of Ottawa and the Commissioners to recover the moneys so disbursed as aforesaid and has refused to assume the said liability to the Bank of Ottawa and it is desirable to declare the rights of the parties;

“Therefore His Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

“1. It is declared that the Commissioners disbursed the moneys and incurred the liability herein recited for payments and expenditures which were necessary to maintain and carry on the said schools and which should have been

made by the Board in the proper conduct and management of the said schools but for its wrongful neglect and default as aforesaid.

"2. It is further declared that the said payments and expenditures shall be deemed for all purposes to have been made by the Commissioners for and on behalf and at the request of the Board and that the Commissioners are entitled to indemnity from the Board in respect thereof.

"3. It is further declared that the said liability of \$71,891.16 and interest thereon to the Bank of Ottawa, subject to the rights of third parties, if any, is a debt of the Board to the said Bank and that the Bank is entitled to set off the same against any other moneys of the Board in its hands.

"4. In default of payment of the said liability by the Board the same may be paid to the Bank out of the Consolidated Revenue Fund of the Province and thereafter the said sum with proper interest thereon shall be a debt to His Majesty and may be recovered from the Board in any action brought for that purpose.

"5. This Act may be pleaded as a defence to any action now pending or that may hereafter be brought by the board against any person or Corporation in respect of any of the moneys received and disbursed by the Commission as aforesaid.

"6. The Order in Council made on August 26, 1915, which is set out in the Schedule herewith, is confirmed and declared to be and to have been from the said date, legal, valid and binding, and the Commissioners shall be indemnified by the Province from and against all liability for indebtedness incurred by them or damages recovered against them by reason of any of said payments and expenditures by them as aforesaid or in consequence of anything done or suffered by them or any of them while acting as such Commissioners.

"SCHEDULE.

"Copy of an Order in Council approved by His Honour the Lieutenant-Governor, August 26, 1915.

"The Committee of Council have had under consideration the report of the Honourable G. H. Ferguson, Acting Minister of Education, dated 19th August, 1915, wherein

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he states that in view of the pending litigation in which the Roman Catholic Separate School Board for the City of Ottawa is Plaintiff and the Quebec Bank a party Defendant, the Quebec Bank has declined to pay to the Ottawa Separate School Commission the moneys heretofore, now or hereafter standing to the credit of the said Board in the said Bank without a bond of indemnity from the Province in that behalf, and that there is urgent need of the moneys in question for the purpose of the Commission and of the separate schools under their control and management, and it is advisable to comply with the request of the Bank. The Minister, therefore, recommends that he be authorized and empowered as Acting Minister of Education on behalf of the Province to execute and deliver with the seal of the Department of Education to the Quebec Bank a bond indemnifying and saving harmless the Bank from all loss, costs or damage the Bank may at any time suffer or sustain on account of or by reason of the payment or transfer at any time and from time to time by the said Bank to the Ottawa Separate School Commission of any moneys heretofore, now or hereafter standing to the credit of the Roman Catholic Separate School Board for the City of Ottawa in the books of the said Bank or that otherwise but for the appointment of the said Commission would be the property of or payable to the said Board, or of any loans, advances, overdrafts or credits at any time or from time to time that may be made or given by the Bank to the Commission, or of anything otherwise lawfully relating to the premises, the bond to be in such penal sum and in such form and to contain such provisions as may be satisfactory to the said Bank and to the Counsel for the Department of Education.

"The Committee concur in the recommendation of the Minister and advise that the same be acted on.

"Certified,

"J. LONSDALE CAPREOL,

"Clerk, Executive Council."

The Attorney-General for Ontario was allowed to intervene as a defendant. The consolidated cases were tried by Clute J., who pronounced judgment in favour of the appellants but under deduction so far as the Commissioners were concerned of whatever sums they could show they had properly expended on the conduct of the schools while

under their charge. The Appellate Court of Ontario unanimously overruled this judgment and dismissed the actions. Appeal has now been taken to this Board.

The claim against the Quebec Bank would be obviously good at common law. The bank was the debtor of the appellants, and it would be no defence to say that they had paid the money to a Commission whose authority was based on an Act of the Provincial Legislature which had been declared to be ultra vires. The real defence to the action lies in the later statute quoted above. It is equally clear that this statute by its terms provides a complete defence. The only real question is therefore whether that statute also is ultra vires. It can only so be held if it contravenes the exception to s. 93, sub-s. 1, of the British North America Act, or in other words if it prejudicially affects a right or privilege of the appellants. For indubitably in other respects it is a measure dealing with civil rights and as such within the domain of the provincial Legislature.

It was frankly admitted by the learned counsel for the appellants that the money spent and the liability incurred was spent and incurred in the carrying on of the schools in a proper manner: that is to say was not in any way expended on purposes other than the carrying on of the schools. The appellants cannot say that the money if they had had it would not have been spent on the same purposes; all that they can say is that they would have had the control and spending of it. The right which has got to be prejudicially affected is the right to maintain separate schools under the Education Acts. Now it was pointed out by the Lord Chancellor in deciding the *Ottawa Corporation Case* (1), that there might be cases where a right might be affected without being prejudicially affected. It will at once be apparent what a contrast there is between the legislation which was the subject of that decision and that in the present case. There the right of the appellants to conduct their schools was taken away for an indefinite period. Their restoration did not depend on themselves but could only be given them by others. They are now restored—that legislation having been held to be ultra vires—but their extrusion from management is a matter of past history which no legislation can obliterate. Nor does the present

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legislation seek to do so. It is possible to criticise the words used, but the gist of the statute is unmistakable. All it does is to declare that the payments made while the schools were being carried on by others than the appellants are good payments against the funds which were only raised and only available for the conduct of the said schools. If the contention of the appellants were given effect to—for they argued that the deduction allowed by Clute J. was unwarranted—the result would be that the schools would have been carried on by funds provided gratuitously by the Banks or by the individual Commissioners, the appellants would be in the possession of funds which had been destined for the carrying on of the schools in the past, and which as they could not now be so applied, would form a gratuitous bonus in their hands. Their Lordships therefore agree with the unanimous judgment of the Supreme Court that the statute is not ultra vires and that the actions fall to be dismissed. They fail to see that the right of the appellants has been in any way prejudicially affected by the statute. The only way in which they were prejudicially affected was by the action of the former statute, which extruded them from the management of the schools. Had they been left in management they would necessarily have spent this very money for the same purposes. It cannot be said to create a prejudice to affirm that the money was rightly spent for the purposes for which it was destined. The same ratio applies to a liability incurred by others for an equally proper purpose.

It may be as well to say a word as to the position of the 37,000 dollars held by the Bank of Ottawa. On the appellants paying the debt incurred to the Bank of Ottawa of 71,000 dollars odd, the said sum of 37,000 dollars will of course be made available to the appellants for the purpose for which it was set aside—namely, the provision of a sinking fund for certain debentures.

Their Lordships will therefore humbly advise His Majesty to dismiss the appeals.

The appellants will pay the respondents' costs. The Attorney-General of Ontario will bear his own costs.

Solicitors for appellants: *Harrison, Powell & Tulk.*

Solicitors for respondents: *Lawrence Jones & Co.*

Solicitors for intervener: *Freshfields and Leese.*

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CORPORATION OF THE CITY OF } RESPONDENTS.
TORONTO }ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS
FOR CANADA AND THE SUPREME COURT OF ONTARIO.

Canada—Railways—Powers of Railway Board—Legislative Power of Dominion—Carrying Highway over Dominion Railways—Apportionment of Cost on Provincial Railway—Right of Appeal to Privy Council—Petition for Special Leave—Inaccuracy—Railway Act (R. S. Can., 1906, c. 37), ss. 46, 59, 237, 238—8 & 9 Edw. 7, c. 32 (Dom.), s. 5—British North America Act, 1867 (30 & 31 Vict., c. 3, Imp.), ss. 91, 92.

An appeal lies, by special leave, to His Majesty in Council, from an order of the Board of Railway Commissioners for Canada, but, having regard to the nature of the functions of that Board and the rights of appeal given by the Railway Act, leave should be granted cautiously and only under special circumstances.

A Provincial railway ran along a highway in Toronto which crossed on the level the tracks of three Dominion railways. Upon an application to the above-mentioned Board by the Toronto Corporation the Board made an order under the Railway Act, 1906, ss. 237, 238, as amended in 1909, authorizing the Corporation to carry the highway, with the tracks of the Provincial railway, over the tracks of the Dominion railways, and ordering that the Corporation should submit plans and complete the works by specified dates; the order further directed that the cost of construction should be borne in specified proportions by the Corporation and the four railway companies:—

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Held (1.) that the order was mandatory and not merely permissive, and that consequently the Railway Board had power under s. 59 of the Railway Act to direct that the Provincial railway should contribute to the cost of construction; (2.) that that power being ancillary to the powers of the Railway Board with regard to Dominion railways the section was within the legislative power of the Dominion; (3.) that s. 46 of the Railway Act, under which the order was made a rule of the Supreme Court of Ontario, was *intra vires*.

British Columbia Electric Ry. Co. v. Vancouver, Victoria and Eastern Ry. and Navigation Co. [1914] A.C. 1067 distinguished.

Toronto Corporation v. Canadian Pacific Ry. Co. [1908] A.C. 54 applied.

It is incumbent upon the petitioners in any case in which special leave is applied for to see that the facts are correctly brought to the notice of the Judicial Committee, and if at any stage it is found that there has been failure to do so, the leave may be rescinded.

Observations in *Mussoorie Bank v. Raynor* (1882) 7 App. Cas. 321 affirmed.

Judgments appealed from affirmed.

*Present: VISCOUNT FINLAY, VISCOUNT CAVE, LORD SUMNER and LORD PARMOOR.

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APPEAL by special leave from orders of the Board of Railway Commissioners for Canada (July 3, 1909, and November 30, 1917), and an order of Middleton J. (Supreme Court of Ontario) refusing a stay of execution.

The effect of the orders appealed from, of which the order of July 3, 1909, was that substantially in question in the present appeal, and the relevant facts and statutory enactments appear from the judgment of their Lordships.

1919. Nov. 21, 24, 25. *Geary K.C.* and *Fairty* for the respondents. There are preliminary objections to the hearing of this appeal. There was no power to grant special leave to appeal from the order of the Railway Board. That Board is not a Court for purposes of appeal to the Privy Council; it succeeded the Railway Committee of the Privy Council of Canada, and its functions are of the same character and are almost wholly administrative. The principal order now appealed from was of that kind. No appeal from an order of the Railway Board has ever been entertained by the Judicial Committee. In *Canadian Pacific Ry. Co. v. Toronto Corporation* (1), after objection, the appeal was heard but on the ground that it was from the judgment of the Supreme Court of Canada, certifying its opinion under s. 56, sub-s. 5. The second objection is that the petition upon which special leave was obtained contained an inaccurate statement of the reasons for delay. The special leave should be rescinded upon that ground: *Mussoorie Bank v. Raynor*. (2)

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Sir John Simon K.C., *D. L. McCarthy K.C.* and *Giveen* for the appellants. There is a prerogative right to grant special leave to appeal to His Majesty in Council from orders of the Railway Board. That Board is a Court of record constituted by s. 10 of the Railway Act (R. S. Can., 1906, c. 37). No doubt some of the orders made by the Railway Board are purely administrative but when, as in this matter, it exercises the functions of a Court of record, an appeal lies by special leave: Judicial Committee Act, 1844 (7 & 8 Vict., c. 69), s. 1; *Canadian Pacific Ry. Co. v. Toronto Corporation*. (3) The prerogative is excluded only in two ways, either by the Imperial Parliament setting up a Constitution excluding or limiting the right (e.g., s. 74 of the Common-

(1) [1911] A.C. 461.

(2) (1882) 7 App. Cas. 321.

(3) [1911] A.C. 461, 470.

wealth of Australia Constitution Act, 1900), or, as in the case of the South Africa Act, 1909, s. 106, by the Imperial Parliament empowering a local Legislature to enact that certain subjects shall be excluded. Although para. 19 of the petition may not have been strictly accurate, there is no substance in the second objection. No objection was taken on the appellants' printed case being filed.

[Their Lordships desired that the hearing of the appeal should proceed, judgment upon the preliminary objections being reserved.]

The appellants rely upon three grounds in support of their appeal. First, the Railway Board had no power under the Railway Act, as amended at the date of the order, to order the appellants to contribute to the cost of construction of the high level bridge: *British Columbia Electric Ry. Co. v. Vancouver, Victoria and Eastern Ry. and Navigation Co.* (1) is not distinguishable. As in that case the Railway Board merely authorized the corporation to carry out the work proposed. Nor was the order authorized by sub-s. 3 of the amended s. 238 enacted by s. 5 of 8 & 9 Edw. 7, c. 32 (Can.). In that sub-section the words "the company" and "person" refer to sub-s. 1 and mean the company applying and the person aggrieved. Secondly, the appellant railway is a purely Provincial undertaking. If the order upon them to contribute purports to be authorized by the Railway Act that Act is to that extent ultra vires of the Dominion Parliament having regard to ss. 91 and 92 of the British North America Act, 1867. An ancillary power to deal with undertakings within the legislative ambit of a Province is to be implied only where it is "necessarily incidental" to the power confided to the Dominion Parliament: *City of Montreal v. Montreal Street Ry.* (2) Thirdly, s. 46 of the Railway Act, so far as it purported to provide that the order might be made a rule of the Supreme Court of Ontario and should (not might) be enforced as such, was ultra vires having regard to head 14 of s. 92 of the British North America Act, 1867.

Geary K.C. and *Fairty* for the respondents. The Railway Board had power to order the appellants to contribute under the amended s. 238, sub-s. 2 of the Railway Act, 1906. But it is not necessary to establish that since, the order being

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(2) [1912] A.C. 333, 344.

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an order under the Act, there was power under s. 59. The appellants were "interested in or affected by" the order within the meaning of that section: *British Columbia Electric Ry. Co. v. Vancouver, Victoria and Eastern Ry. and Navigation Co.* (1) is distinguishable. The order there under consideration was of a purely permissive character, the works being in the nature of a municipal improvement. That was the basis of the decision. Here the order was made for the avoidance of danger to the public, and was mandatory with regard to the completion of the works by a specified date. The facts are substantially identical with those in *Toronto Ry. Co. v. City of Toronto*. (2) The Supreme Court in that case rightly distinguished the decision of the Privy Council in 1914; a petition to the Privy Council for special leave to appeal was rejected. The power to make the order was ancillary to the powers of the Railway Board with regard to the Dominion railways which were to be crossed: *Toronto Corporation v. Canadian Pacific Ry. Co.* (3); *City of Montreal v. Montreal Street Ry.* (4); *City of Toronto v. Grand Trunk Ry. Co.* (5) The provisions of the Railway Act authorizing the order were therefore intra vires. There is no substance in the objection relative to s. 46; further, there was no appeal from the making of the order a rule of Court. The practice of the Supreme Court of Ontario in the matter is well settled: *In re Dominion Cold Storage Co.* (6)

Sir John Simon K.C. in reply. The facts of this case bring it within the decision of the Privy Council in 1914 rather than within that of the Supreme Court of Canada in 1916. If not, the latter decision was erroneous. The directions to file plans and to complete the work by specified dates were merely the terms upon which the permission was given; they do not prevent the order from being permissive in character.

Dec. 18. The judgment of their Lordships was delivered by

VISCOUNT FINLAY. This is a case in which special leave has been obtained by the Toronto Railway Company to

(1) [1914] A.C. 1067.

(2) (1916) 53 Can. S.C.R. 222.

(3) [1908] A.C. 54.

(4) [1912] A.C. 333, 344.

(5) (1906) 37 Can. S.C.R. 232.

(6) (1898) 18 (Ont.) Practice Reports, 68, 72.

appeal against three orders. The first of these orders was made on July 3, 1909, by the Railway Board for Canada and directed that the Toronto Railway Company should bear a certain proportion of the costs of construction of a bridge which the Corporation was by the order authorized to construct for the purpose of carrying the highway of Queen Street East, Toronto, with the tracks thereon of the Toronto Railway Company, a Provincial railway, over the tracks of the Canadian Pacific Railway Company, the Grand Trunk Railway Company, and the Canadian Northern Ontario Railway Company, all three Dominion railways. The second order was dated November 30, 1917, and by it the Railway Board directed that the Toronto Railway Company should make a payment of 80,000 dollars on account towards the cost of construction. The third order appealed against was dated February 4, 1918, and was made by Middleton J., of the Supreme Court of Ontario, refusing a stay of execution against the Toronto Railway Company.

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It was urged on behalf of the appellants that the order for payment of part of the costs of construction was not authorized by the Railway Act. On behalf of the respondents, the Corporation of Toronto, it was contended, first, that special leave to appeal from orders of the Railway Board cannot be granted; secondly, that the order for special leave to appeal in the present case ought to be rescinded, on the ground that the relevant facts were not correctly stated in the petition; and, thirdly, that the order for payment of part of the costs of construction made against the Toronto Railway Company was authorized by the Railway Act and could not be impeached.

Queen Street East is a public highway in Toronto running east and west, and along it runs the appellants' railway. It was crossed on the level by the railways of the Canadian Pacific, the Grand Trunk, and the Canadian Northern Ontario Railway Companies. On June 20, 1905, an application was made by the Toronto Corporation to the Railway Board under s. 186 of the Railway Act of 1903, for an order permitting the Corporation to construct a high level bridge over the tracks of the railways crossing Queen Street East, and for an order determining the proportions in which the costs of construction should be borne by the railways and other parties interested. This application was served on the several railway companies, one of which

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was the Toronto Railway Company, the present appellants. The application was heard in April, November and December, 1906, by the Railway Board. The Toronto Railway Company appeared by counsel before the Board. On December 12, their counsel admitted the jurisdiction of the Board to order the company to contribute a part of the costs as a party interested, but later in the day he stated that this concession was made only for the purpose of the argument in case some other remedy should be open to him.

On July 3, 1909, the Railway Board made the principal order appealed against. It is in the following terms:—
“In the matter of the application of the City of Toronto, hereinafter called the ‘applicant,’ for authority to build a high level bridge over the Don Improvement and the tracks of the Canadian Pacific Railway Company, the Grand Trunk Railway Company, and the Canadian Northern Ontario Railway Company, at Queen Street East, in the City of Toronto: Upon hearing evidence and what was alleged by counsel for the applicant, the Toronto Street Railway Company, the Canadian Pacific Railway Company, the Grand Trunk Railway Company, and the Canadian Northern Ontario Railway Company—

“It is ordered: 1. That the applicant be, and it is hereby, authorized to construct a bridge to carry the highway and the tracks of the Toronto Street Railway Company over the tracks of the Canadian Pacific Railway Company, the Grand Trunk Railway Company, and the Canadian Northern Ontario Railway Company, where such tracks cross Queen Street East, in the City of Toronto. 2. That the applicant submit detail plans of the proposed bridge and approaches thereto for the approval of an engineer of the Board by September 15, 1909, and construct the bridge ready for traffic by July 1, 1910. 3. That the cost of the construction of the bridge and approaches and the land damages, if any, shall be paid as follows: The City of Toronto, 15 per cent.; the Toronto Street Railway Company, 15 per cent.; the Canadian Pacific Railway Company, 35 per cent.; the Canadian Northern Ontario Railway Company, 25 per cent.; and the Grand Trunk Railway Company (Belt Line), 10 per cent. 4. That, upon completion, the said bridge shall be maintained by the applicant; the cost of such maintenance, with the exception of the cost of the maintenance of the roadway and sidewalks on said bridge

and approaches, shall be paid as follows: By the City of Toronto, 70 per cent.; by the Canadian Pacific Railway Company, 10 per cent.; by the Canadian Northern Ontario Railway Company, 10 per cent.; by the Grand Trunk Railway Company, 10 per cent.; the cost of the maintenance of the roadway and sidewalks on said bridge and approaches shall be borne entirely by the applicant. 5. That any matter in dispute between any of the parties hereto with regard to the carrying out of the provisions of this order, shall be determined by the chief engineer of the Board."

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On September 10, 1909, the Toronto Railway Company gave notice of application to the Railway Board, under s. 56, sub-s. 3, of the Railway Act, 1906, for leave to appeal to the Supreme Court, on the ground that, as a matter of law, the company should not have been ordered to pay any portion of the cost of construction. This application was on September 15 refused by the Railway Board. On September 21 the company applied, under s. 56, sub-s. 2, of the Railway Act, for leave to appeal to the Supreme Court on the question whether there was jurisdiction to make the order. This application was refused by Duff J., and no attempt was made to get leave to appeal from this refusal.

The second order appealed against, for payment to be made on account, was not made till November 30, 1917, and is subsidiary to the principal order of July 3, 1909; it was made a rule of the Supreme Court of Ontario under s. 46 of the Railway Act, 1906, in January, 1918. The third order appealed against—that of February 4, 1918—is a refusal to stay execution.

A petition for special leave to appeal was presented in July, 1918, nine years after the date of the principal order appealed against. The petition for special leave contains the following paragraph, which has reference to the great lapse of time which had taken place:—"19. That since the year 1909 the whole question involved has been in dispute between your petitioners and the City of Toronto; that until the year 1917 your petitioners were unaware whether and to what extent the City of Toronto would finally press for payment of the expenses of the said bridge by your petitioners; that after the judgment given in the case of the *British Columbia Electric Ry. Co. v. Vancouver, Victoria and*

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Eastern Ry. and Navigation Co. (1) upon appeal to Your Majesty in Council (the reasons for which judgment, in your petitioners' submission, show that there is no jurisdiction in the said Board to order your petitioners to pay such expenses) your petitioners hoped that no further attempt would be made by the City of Toronto to obtain an order for such payment; that matters remained still in dispute pending any attempt by the City of Toronto to get a final order, and, further—pending the settlement of all outstanding disputes (of which there are several) upon the expiration of your petitioners' franchise in the year 1921; but that by the procedure now adopted the City of Toronto have sought to obtain a very large sum of money from your petitioners, to payment of which your petitioners submit the City of Toronto are not entitled."

At the opening of the case Mr. Geary made a preliminary objection to the jurisdiction, decision on which was reserved until the case should have been heard. Mr. Geary contended that it was not competent to grant special leave to appeal to His Majesty in Council direct from the Railway Board. Their Lordships, after full consideration, have arrived at the conclusion that the Railway Board is not exempt from the prerogative of the Crown to grant special leave to appeal. The Railway Board is not a mere administrative body. It is a Court of record, and it may be of importance that in some special cases its decisions on points of law should be taken on special leave direct to His Majesty in Council. The prerogative of granting special leave to appeal is, *prima facie*, applicable to all Courts in His Majesty's Dominions, and their Lordships cannot see any ground which would warrant them in holding that the Railway Board is exempt from the general rule. At the same time, their Lordships must add that, in their opinion, this is a power which, in the case of the Railway Board, should be very sparingly exercised. There is by the Railway Act a general power conferred on the Governor in Council, either on his own motion or upon petition, to vary or rescind any order of the Railway Board (s. 56). By the same section there is given an appeal to the Supreme Court on any point of law, leave being obtained from a judge of that Court, and provision is also made for an appeal to the Supreme Court,

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with leave of the Railway Board, on any question of jurisdiction. Having regard to these provisions, it would appear that the power of granting special leave to appeal from orders of the Railway Board should be cautiously exercised and only under special circumstances.

Mr. Geary further contended that the special leave in the present case ought to be rescinded, on the ground of inaccuracy in the statements made in para. 19 of the petition. This point will be dealt with at a later stage of this judgment.

Their Lordships proceed to consider the case upon its merits. It depends upon the terms of the Railway Act, and the relevant enactments are contained in the Act of 1906, with the amendments introduced by the Railway Act of 1909. The most material sections are s. 59 and ss. 237 and 238, both of which latter are amended by the Act of 1909.

Sect. 59, by sub-s. 1, provides in effect that when the Board, in the exercise of any power vested in it by that Act or by the special Act, by order directs any works it may order by what company, municipality or person interested in or affected by such order the same shall be constructed. Sub-s. 2 provides that the Board may order by whom, in what proportion, and when, the expenses of such works shall be paid.

This section applies to every case in which the Board by any order directs works, and gives it power to "order by what company, municipality or person interested in or affected by such order" they shall be constructed, and to order by whom the expenses of construction shall be paid. There is not in sub-s. 2 any definition of the class of persons who may be ordered to pay such expenses, but it seems clear that sub-s. 2 must be read with reference to the immediately preceding provision and that such an order may be made only on a company, municipality or person interested in or affected by the order directing the works. It appears to their Lordships that where the Board, in the exercise of its statutory powers, makes such an order as was made in the present case on July 3, 1909, that is a case in which the Board by order directs works to be constructed within the meaning of s. 59. It would be reading the words "by any order directs" in that section too strictly if they were held to apply only to cases in which the order takes the form of a

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command for the execution. They are satisfied by an order of the Board giving authority for the construction to a municipality or other applicant and containing directions with regard to it such as are contained in this order of July 3. It follows that in such a case the Board may order by what company, municipality or person interested in or affected by the order directing the works the expenses should be paid.

Where a responsible public body applies for leave to construct the works, no formal command for their execution is wanted; leave is enough, such as was granted by cl. 1 of the present order. But cl. 2 orders the submission of detailed plans by September 15, 1909, and that the bridge be ready for traffic by July 1, 1910. The applicant takes the leave with the orders in cl. 2, and these orders might be enforced by the Board. To treat completion by July 1, 1910, as merely a condition on which the leave was granted is to ignore the fact that completion by that date is in terms ordered, and such a construction would leave the Board and the public with no redress except the cancelling of the leave. The same observations apply to the filing of the plans.

It is impossible to treat this order as merely permissive; it is mandatory.

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Sects. 237 and 238, as they stood in the Act of 1906, made provision for the case of a railway crossing a highway, or vice versa, but did not contain any provision as to the payment of expenses of the works. Sect. 59 would apply to the case of any order made under either of these sections, as being made under the Act of which s. 59 forms part. Sects. 237 and 238 are, however, repealed by the Act of 1909 (8 & 9 Edw. 7, c. 32), and replaced by the new ss. 237 and 238 as they stand in the Railway Act.

The new s. 237 deals with the case of an application for leave to construct a railway upon, along or across a highway, or a highway along or across a railway. It provides for the submission to the Board of plans and profiles, and empowers the Board by order to grant the application on such terms as it thinks proper, or to order that the railway be carried over, under or along the highway, or vice versa, or that there should be a diversion of either, or that protective measures, by employment of watchmen or the execution of other works, be taken to diminish the danger of the crossing.

The new s. 238 deals in its first sub-section with the case of a railway already constructed upon, along or across any highway, and provides that in such case the Railway Board may, of its own motion, or on application on behalf of the Crown or any municipality or other corporation, or any person aggrieved, order the company to submit plans to the Board, and may make orders such as are authorized by s. 237 for the avoidance of danger. Sub-s. 3 contains a provision for the payment of the expenses which is applicable to orders alike under s. 237 and s. 238. The words of this sub-section should be quoted: "Notwithstanding anything in this Act or in any other Act, the Board may, subject to the provisions of s. 238a of this Act, order what portion, if any, of cost is to be borne respectively by the company, municipal or other corporation, or person, in respect of any order made by the Board under this or the preceding section, and such order shall be binding on and enforceable against any railway company, municipal or other corporation, or person named in such order."

Whatever be the construction of this sub-section, there is nothing in it to put an end to the application of s. 59 to orders under ss. 237 and 238. The power given by s. 59 applies in the case of any order made by the Board in the exercise of any power vested in it by the Railway Act. As ss. 237 and 238 are part of the Railway Act, it follows that s. 59 applies to orders made under them. The order is, therefore, good by virtue of s. 59, and it is unnecessary to consider how far it might also be supported under s. 238, sub-s. 3.

The Toronto Railway Company's lines ran along the surface of Queen Street East and crossed on the level the lines of the three Dominion railway companies. The order of the Railway Board involved carrying the highway, with the lines of the Toronto Railway Company upon it, by a bridge over the lines of the Dominion railways. The Toronto Railway Company was therefore beyond all question interested in or affected by the works ordered. How far the Toronto Railway Company benefited by these works, and what proportion of the costs it was fair to throw upon that company, was entirely a matter for the Railway Board to decide.

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The first objection raised by the appellants to the order as to costs was that the railway of the Toronto Railway Company is a Provincial railway, and that any enactment giving power to throw upon it the costs of works would be ultra vires the Dominion Parliament. Reference was made to s. 92 of the British North America Act, which gives the Provincial Legislature the exclusive right of making laws with regard to local works or undertakings not declared by the Parliament of Canada to be for the general advantage of two or more of the Provinces. It was also urged that the Provincial railway company was not interested in or affected by the works in question. Both of these objections are answered by the decision of this Board in the case of *Toronto Corporation v. Canadian Pacific Ry. Co.* (1) The order of the Railway Committee of the Canadian Privy Council to which that case relates had been made in 1891, under the Dominion Railway Act, 1888. It directed gates and watchmen at certain level crossings on the Canadian Pacific Railway within the area of the municipality of Toronto, and provided that the cost should be borne, as to one half, by the Corporation. The Toronto Corporation paid their annual contributions under the order down to 1901. They then refused further payment, and the action was brought by the Canadian Pacific Railway Company to enforce it. The sections under which the order was made were ss. 187 and 188 of 51 Vict., c. 29 (the Railway Act of 1888). Sect. 187 gave the Railway Committee power in the case of level crossings to direct works or protection by a watchman or by a watchman and gates. Sect. 188 was as follows: "The Railway Committee may make such orders, and give such directions respecting such works and the execution thereof, and the apportionment of the costs thereof, and of any such measures of protection, between the said company and any person interested therein, as appear to the Railway Committee just and reasonable."

It was decided in that case by the judgment of this Board, affirming the Canadian Courts, that the enactment throwing the expenses in part on parties interested was intra vires of the Canadian Parliament. Lord Collins in delivering the judgment said that there was nothing ultra vires in the ancillary power conferred by ss. 187 and 188 to make an

(1) [1908] A.C. 54, 59.

equitable adjustment of the expenses among the parties interested. Corporations interested in such works are subject to the legislation of the Dominion Parliament as to their cost though generally subject only to the Provincial Legislature. On the second contention, namely that the Provincial railway company was not a person interested, Lord Collins, after pointing out that the word "person" includes a municipality, said: "And their Lordships fully concur in the conclusion and reasoning of Meredith J. A., in the Court below, that in this case the municipality was a person interested." The municipality was interested in respect of its guardianship of the safety of the public, and the interest of the Toronto Railway Company in the present case is obvious on the mere statement of the facts.

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The two sections on which the decision in the Toronto case in 1908 proceeded were replaced in the Railway Act of 1903 by ss. 186, 187 and 47 of that Act, and in the Act of 1906, originally and as amended in 1909, by ss. 237 and 238 and s. 59. The reasoning of the judgment in the case of 1908 is just as applicable to cases arising under these substituted enactments. The contention of the appellants that it is ultra vires of the Dominion Parliament in legislating for a Dominion railway to make incidental provision affecting Provincial municipalities or railway companies, appears to their Lordships to be based on no principle. It is not a case in which there is any meddling by the Dominion Parliament with the working of a Provincial railway company; there is only a provision that it shall bear cost of works in relation to the Dominion railways which affected the Provincial line. To hold that such a provision was ultra vires would give rise to very great difficulty in dealing with railways by legislation under any scheme of federation.

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The authority chiefly relied upon by the appellants was the judgment of Lord Moulton in *British Columbia Electric Ry. Co. v. Vancouver, Victoria and Eastern Ry. and Navigation Co.* (1), reversing a decision of the Supreme Court of Canada. (2) In that case there were certain streets in Vancouver which were crossed on the level by the lines of the Vancouver, etc., Railway Company, a Dominion company. On application made by the Corporation of the City of Vancouver, the Railway Board, on October 14, 1912, made an order

(1) [1914] A.C. 1067.

(2) (1913) 48 Can. S.C.R. 98.

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authorizing the applicant to carry these streets across the tracks of Vancouver, etc., Railway Company by means of overhead bridges, as shown on the plans filed with the Board (detailed plans to be submitted). There is nothing in this order, as in the case now under consideration, directing that the works should be completed by a particular date. In this respect the order in the Vancouver case stands in marked contrast to the terms of the order in the present case. The lines of the British Columbia Electric Railway Company, a Provincial railway, ran along certain of these streets, crossing the Dominion Railway Company's lines, before the bridge was constructed, on the level, and afterwards by the bridge. The order contained a direction that part of the cost of constructing the bridge was to be paid by the Electric Railway Company, and on appeal by the Electric Railway Company from this part of the order, it was held by the Supreme Court of Canada that it was *intra vires* (Duff J. and Brodeur J. dissenting).

In the Judicial Committee it was held on appeal to be bad as regards the directions as to the cost, and the ratio decidendi appears from the judgment. Their Lordships would particularly refer to the following passages in the judgment delivered by Lord Moulton: "Their Lordships entirely agree with the remarks of Duff J. as to the ground and reason of the application of the Corporation to the Railway Board. Referring to the statement made at the hearing by Mr. Baxter, who represented the Corporation, he says: 'Mr. Baxter's statement makes it quite clear that the occasion for the application arose from the necessity of determining the permanent grade of these four streets. It was a question, he said, whether on the one hand the grade was to be elevated, or on the other, the grade was to be made to conform to the grade of the railway tracks and level crossing established. It was necessary to have the matter disposed of because people were applying for permits to build upon these streets, and these could not be granted owing to the inability of the municipality to give the grade of the streets. The council preferred the former of the two alternative courses because they recognized that the street grades were too low and must inevitably be raised.' It follows, therefore, that the application was a matter between the Corporation and the railway company

alone. (1) It is sufficient to point out that the order is not made under s. 59 nor does it come within its provisions. It does not direct that any work should be done. It is an order of a purely permissive character granting a privilege to the corporation which they may exercise at the expense of a third party, and it leaves it to the corporation to decide whether they shall avail themselves of it or not. The provisions of s. 59 relate to a wholly different class of cases." (2)

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Lord Moulton treats the order of the Board as merely permitting the Corporation to make a municipal improvement in the grading of the streets. The order is not regarded as proceeding on any consideration of danger arising from the level crossing or as having anything to do with the railways as such. The matter was treated as one merely of street improvement for which a permissive order was given by the Railway Board. The keynote of the judgment is struck in one sentence: "It follows therefore that the application was a matter between the Corporation and the railway company alone." The judgment proceeds on the principle that the assent of the Board was asked merely because the viaduct would cross the Dominion railway, and that this gave no jurisdiction to make the Electric Company pay the costs of construction. The order was treated as not falling within either s. 59 or s. 238 of the Railway Act; indeed, the latter section is not even mentioned in the judgment.

In *Toronto Ry. Co. v. City of Toronto* (3) the Supreme Court had to deal with a case in which the tracks of the Toronto Railway Company in Avenue Road, Toronto, crossed the tracks of the Canadian Pacific Railway Company on rail level. The chief engineer of the Railway Board had reported to the Board that the crossing was dangerous, and the Board of its own motion ordered that the street be carried under the Canadian Pacific Railway Company's tracks. It was held that the order was made for the protection, safety and convenience of the public; that the Toronto Railway Company was a company interested in or affected by the order, and that the Board had jurisdiction to direct that it should pay a portion of the cost of the subway. The Chief Justice treated the order as being made under the provisions of s. 238. He pointed out that

(1) 1914 A.C. 1067, 1074.

(2) Ibid. 1075.

(3) 53 Can. S.C.R. 222.

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the substantial reason for the order was the elimination of dangerous crossings, and that it could make no difference that occasion was taken for abolishing these crossings when the separation of grades on a neighbouring street was decided upon, and said that the facts were wholly different from those in the Vancouver case. Davies J. said that the controlling ground for the order was the safety and protection of the public, while in the Vancouver case it was merely a matter of street improvement. Anglin J. said that the Judicial Committee in the Vancouver case viewed the matter as one of street improvement merely, in which the municipal corporation and the Dominion Railway Company were alone concerned.

In the present case the order appears to their Lordships to be in substance mandatory, and to be made for the protection and convenience of the public with regard to the crossings of the railways. What was done may have improved the streets, but it was certainly not a mere matter of street improvement. Their Lordships therefore think that the Vancouver case is distinguishable from the present.

Their Lordships are of opinion that s. 46 of the Railway Act, 1906, is not ultra vires, and that the objection taken to the procedure followed in making the order a rule of Court fails. On this point they are content to refer to the judgment of Middleton J.

For these reasons, in the opinion of their Lordships, the appeal fails on the merits.

There is, however, another aspect of the case on which it appears desirable that some observations should be made.

The substantive order against which leave was obtained to appeal was made so long ago as July 3, 1909. The orders of November 30, 1917, and February 4, 1918, were merely subsidiary. The fact that so long a period had elapsed since the order was made was one which would militate strongly against the granting of special leave. It must have been to meet this difficulty that para. 19 was introduced into the petition. It appears to their Lordships that the allegations in that paragraph are not borne out by the documentary evidence to which their attention was drawn by the counsel for the respondents.

There is a correspondence between the corporation and the Toronto Railway Company set out in the respondents'

appendix of documents. [The judgment after referring to the various material letters and documents proceeded as follows:]

Para. 19 of the petition for special leave opens with the statement "that since the year 1909 the whole question involved has been in dispute between your petitioners and the City of Toronto." Their Lordships cannot find that before the answer by the appellants on August 13, 1915, to the respondents' application to the Railway Board dated July 21, 1915, the appellants ever disputed their liability for their share of the expenses of construction after the dismissal of their applications for leave to appeal to the Supreme Court in September, 1909. On the contrary, the correspondence proceeds on the footing of their liability. Para. 19 goes on to allege: "that until the year 1917 your petitioners were unaware whether and to what extent the City of Toronto would finally press for payment of the expenses of the said bridge by your petitioners." Their Lordships are unable to find anything in the correspondence that could lead the petitioners to doubt that the City would press for payment. Indeed, the liability of the petitioners is constantly asserted and there are many letters pressing for payment.

It is incumbent on the petitioners in any case in which special leave be applied for to see that the facts are correctly brought to the notice of the Board, and if at any stage it is found that there had been failure to do so, the leave may be rescinded.

In the present case no reflection is made upon the good faith of those who represented the Toronto Railway Company on the application for special leave. The terms of para. 19 of the petition would appear to be due to ignorance of the facts without any intention to mislead. But it is of great importance that the rule laid down by Lord Kingsdown in *Mohun Lall Sookul v. Bebee Doss* (1) should be maintained. He said: "Where there is an omission of any material facts, whether it arises from improper intention on the part of the Petitioner, or whether it arises from accident or negligence, still the effect is just the same, if this Court has been induced to make an order, which if the

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(1) (1861) 8 Moo. I.A. 193, 195.

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facts were fully before it, it would not, or might not, have been induced to make."

Their Lordships desire to express their agreement with the observations made in the judgment in *Mussoorie Bank v. Raynor*. (1) Lord Hobhouse, in delivering the judgment of the Board, said: "At the same time their Lordships desire it to be distinctly understood that an Order in Council granting leave to appeal is liable at any time to be rescinded with costs, if it appears that the petition upon which the Order was granted contains any misstatement, or any concealment of facts which ought to be disclosed. In this case, if their Lordships had any reason to think that there were intentional misstatements in the petition, they would at once rescind the order and dismiss the appeal. But they do not think there was any intention to mislead. . . . Still, if there has been a material misstatement, it is not sufficient to clear the case of bad faith." Lord Hobhouse then quoted the passage from Lord Kingsdown which has been cited above, and, after examining the facts of the case before him, said: "Their Lordships are of opinion that the petition is very faulty, and that due care was not shown in its preparation; but on examining the grounds for asking leave to appeal, they do not think that any different conclusion would or could have been arrived at if the strictest accuracy had been observed." In that case, therefore, the appeal was heard and allowed, but without costs.

In that case the misstatement related only to one of three grounds, the other two being sufficient to justify leave. In the present case para. 19 is addressed to the delay in presenting the petition which, if unaccounted for, might, and probably would, have led to the refusal of leave.

Owing to the course which the case has taken it is not necessary now to deal further with this point, but their Lordships think it proper to say that, if the occasion had arisen for deciding on this objection, it would have been a matter for their grave consideration whether the leave should not be rescinded, however innocent the misrepresentation.

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Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors for appellants: *Charles Russell & Co.*

Solicitors for respondents: *Freshfields & Leese.*

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TORONTO RAILWAY COMPANY..... APPELLANTS;

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TORONTO..... } RESPONDENTS.ATTORNEY-GENERAL FOR THE
PROVINCE OF ONTARIO..... } INTERVENER.AN APPEAL FROM THE SUPREME COURT OF ONTARIO,
APPELLATE DIVISION.*Canada (Ontario)—Legislative Power of Province—Penalty—Provincial Railway Board—Enforcement of Orders—Construction of Statute—Ontario Railway Act (R.S. Ont., 1914, c. 185), s. 260a.—British North America Act (30 & 31 Vict. c. 30, Imp.) s. 92, head 15.*

The appellants, who operated a street railway in Toronto under an agreement with the respondent corporation, were required by an order made by the Railway and Municipal Board of Ontario on February 27, 1917, to place an additional 100 cars in operation by January 1, 1918. Sect. 260a, added to the Ontario Railway Act (R.S. Ont., 1914, c. 185) by an Act passed on March 26, 1918, provided that the above-mentioned Board, for the purpose of enforcing compliance with any order of the above character made by them upon a railway company, might order the company to pay to the corporation of the municipality in which it operated a penalty not exceeding 1,000 dollars a day for non-compliance. On April 19, 1918, the appellants having supplied no additional cars, the Board, acting under s. 260a, ordered them to pay to the respondent corporation 1,000 dollars per day from March 27 to the date of the order.

Held, that s. 260a above-mentioned was intra vires of the Provincial Legislature, but that the order made was not authorized by the section since it was an order not for enforcing compliance with the order of 1917, but for punishing the appellants for a past breach of its requirements.

Judgment of the Appellate Division reversed.

APPEAL by special leave from a judgment of the Supreme Court of Ontario, Appellate Division (December 20, 1918), affirming an order of the Ontario Railway and Municipal Board (April 19, 1918).

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The order of the Ontario Railway and Municipal Board was made under the authority of s. 260a of the Ontario Railway Act, added by 8 Geo. 5, c. 30, s. 4 (Ont.), and ordered the appellant railway company to pay forthwith to the respondent corporation a penalty of 1,000 dollars per day from March 27, 1918, to April 19, 1918, being 24,000 dollars in all for non-compliance with an order of

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that Board, dated February 17, 1917, which required the appellant company to furnish and place in operation upon their railway 100 additional cars not later than January 1, 1918, and 100 more not later than January 1, 1919.

The terms of the order of April 19, 1918, the circumstances in which it was made, and the terms of s. 4 of 8 Geo. 5, c. 5, appear from the judgment of their Lordships.

The proceedings in the Appellate Division are reported at 44 Ont. L. R. 381.

1919. Dec. 5, 8, 9. *Clauson K.C.* and *D. L. McCarthy K.C.*, for the appellants. On April 19, 1918, when the order imposing the penalty was made, it was impossible for the appellants to comply with the order to furnish 100 additional cars by January 1, 1918. The order therefore was not for the purpose of enforcing compliance, but was the imposition of a penalty as a punishment for non-compliance. The order consequently was not authorized by 8 Geo. 5, c. 30 (Ont.), s. 4. The section should not be given a retrospective effect. If the section does authorize the order made, it was ultra vires of the Ontario Legislature, since it related to criminal law and procedure which are reserved to the Dominion Parliament by head 27 of s. 91 of the British North America Act, 1867. The power of a Provincial Legislature under head 15 of s. 92 to impose a penalty is expressly confined to doing so "for enforcing" any law of the Province. Lastly, both orders were void in that the Ontario Railway and Municipal Board was invalidly constituted. The effect of ss. 5, 21, 44 and 53 of the Ontario Railway and Municipal Board Act (R.S. Ont., 1914, c. 186) is to make that Board a "superior Court." Consequently, under s. 96 of the British North America Act, 1867, the members of the Board could be appointed only by the Governor-General, whereas s. 5 of the Ontario Act provides that they shall be appointed by the Lieutenant-Governor of the Province.

[Their Lordships desired that the respondents' argument upon the last contention should be reserved.]

Geary K.C. and *Fairty* for the respondents; *G. Lawrence* and *Ronald Smith* for the intervener. The order of February 27, 1917, imposed upon the appellants a double obligation, namely, to furnish 100 additional cars, and to do so by January 1, 1918; the first obligation was a continuing

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one. Sect. 260a itself was a notice to the appellants that they would from its date be liable for a default. No retrospective effect was given to the section, since the penalty was imposed only from the passing of the Act. That section was intra vires the Ontario Legislature under heads 14 and 15 of s. 92 of the British North America Act, 1867. Both the Act and the order should be construed ut res magis valeat quam pereat. The preamble to the orders, and the circumstances in which it was made, should be considered in order to ascertain its purpose; they show that the purpose was to enforce the order of February 17, 1917. [Reference was made to *Wilson v. McIntosh* (1), *Toronto Corporation v. Toronto Ry. Co.* (2), and Craies on Statute Law, 2nd ed., p. 348.]

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Clauson K.C. in reply referred to *Adkins v. Bliss*. (3)

1920. Jan. 20. The judgment of their Lordships was delivered by

VISCOUNT CAVE. This is an appeal from the judgment of the Appellate Division of the Supreme Court of Ontario dated December 20, 1918, confirming an order of the Ontario Railway and Municipal Board dated April 19, 1918, which ordered the appellants to pay to the respondents the sum of 24,000 dollars.

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The appellants, the Toronto Railway Co., are the holders of an exclusive franchise to operate street railways in the city of Toronto for a period of thirty years from September 1, 1891. The franchise is held under an agreement made between the respondents, the Corporation of the City of Toronto, and the predecessors in title of the appellants, dated September 1, 1891, and confirmed by an Act of the Legislature of the Province of Ontario passed on April 14, 1892 (55 Vict. c. 99).

In the year 1911, the appellants' cars having become overcrowded, the respondents applied to the Railway and Municipal Board of Ontario for an order compelling the appellants to provide more cars; and on November 6, 1914, that Board made an order that the appellants should have in operation an additional fifty double truck motor cars not later than June 1, 1915. These cars have been provided,

(1) [1894] A.C. 129.

(2) [1907] A.C. 315.

(3) (1858) 2 De G. & J. 286.

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although not within the period prescribed. Early in the year 1917 the Corporation renewed the application for more cars, and on February 27, 1917, the Board made an order "that the respondent (the Company) do place in operation on its system 100 additional double truck motor cars not later than the first day of January, 1918, and a further 100 double truck motor cars not later than the first day of January, 1919." Some doubt appears to have arisen as to whether this order was within the powers conferred upon the Board by the Railway Act and the Railway and Municipal Board Act; for on April 12, 1917, the Legislature of Ontario, on the petition of the Corporation, passed an Act (7 Geo. 5, c. 92) whereby the order of February 27, 1917, was ratified and confirmed.

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The order so made and confirmed was not carried out by the Company, and on January 1, 1918, no part of the additional 100 cars ordered to be provided by that date had in fact been provided or placed in operation; and accordingly, on January 30, 1918, the Company and the Corporation were summoned to appear before the Railway and Municipal Board. The notice or summons issued for this purpose is not forthcoming, and its terms must be inferred from the statement made by the Chairman of the Board at the commencement of the hearing, as follows:—"This is a hearing initiated by the Board on its own motion with the view of bringing together the City of Toronto and the Toronto Railway Company to determine what progress has been made in the execution of the order of the Board made on February 27, 1917, directing the Railway Company to furnish 200 additional cars, 100 deliverable on January 1 this year and 100 on January 1, 1919."

The Company and the Corporation accordingly attended by counsel before the Board on January 30, 1918, when some arguments were heard and evidence taken. The "hearing" so instituted was continued on February 13 and 20 and March 15 and 18, and on the last-mentioned date was further adjourned.

During the adjournment last referred to the Legislature of Ontario, on the petition of the Corporation, passed an Act (8 Geo. 5, c. 30) whereby it was provided that the Ontario Railway Act should be amended by adding the following as s. 260a:—"260a.—(1) The Board, for the purpose of enforcing compliance with any order heretofore

or hereafter made by it, requiring any railway company, operating a railway or street railway in whole or in part upon or along a highway under an agreement with a municipal corporation, to furnish additional cars or equipment for its service, in addition to any other powers possessed by it, may order such company to pay to the corporation of the municipality in which the company so operates a penalty not exceeding 1,000 dollars a day for non-compliance with any such order.

“(2) An appeal from any such order or from the refusal by the Board to make an order, shall lie to the Appellate Division of the Supreme Court of Ontario at the instance of either the said corporation or the said company as fully in all respects as from the judgment of a judge at the trial of an action in the Supreme Court; and the judgment of the said Appellate Division shall be final and binding, and no further appeal shall be allowed.”

The Royal Assent was given to this statute on March 26, 1918.

The “hearing” or inquiry above referred to was resumed before the Board on April 19, 1918, on which date, after a short conversation on some recent efforts on the part of the Company to procure the cars required, and notwithstanding a request by counsel for the Company that he might be allowed to submit evidence on the point, the Chairman of the Board proceeded to give judgment. He said that the Board had come to the conclusion that it was the duty of the Company to have placed orders for the 100 cars, and that if contracts had been promptly placed the cars might have been obtained; that the Board did not propose that their orders should be treated lightly; and that the Board proposed to use the powers conferred upon them by the recent Act in the hope that the Company having experienced the disposition of the Board to insist on performance, would act with greater diligence and promptitude and with a real intention to carry out the orders of the Board in future. An order was accordingly made, on the date mentioned above, in the following terms:—“The Board having called upon the above-named respondent to show cause why the order herein of the Board dated February 27, 1917, requiring the respondent, a street railway company operating a railway or street railway upon or along certain highways under an agreement with the applicant, a municipal cor-

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poration, to furnish additional cars for its service, had not been complied with, and upon hearing the evidence adduced and upon hearing counsel for the applicant and the respondent. And it appearing that the said respondent had not complied with the said order of February 27, 1917, and that in the opinion of the Board there had not been proper excuse or justification for such non-compliance by the respondent. And it appearing that, for the purpose of enforcing compliance with the said order, the Board should order the respondent to pay to the applicant a penalty for non-compliance with the said order. 1. This Board doth order that the respondent do forthwith pay to the applicant a penalty of 1,000 dollars per day from March 27, 1918, to the date hereof, both days inclusive, being the sum of 24,000 dollars in all."

An appeal from the above order to the Appellate Division of the Supreme Court of Ontario was dismissed, and thereupon the Company applied for and obtained special leave to appeal from the decision of the Supreme Court to this Board.

On the argument of the appeal before this Board four points were taken on behalf of the appellants.

First it was contended that the Act of 1918 (8 Geo. 5, c. 30), if it is to be construed as authorizing the imposition of a penalty for a past offence, deals with a criminal matter and was therefore beyond the powers of the Provincial Legislature, exclusive legislative authority in relation to the criminal law (including the procedure in criminal matters) having been reserved by s. 91, head 27, of the British North America Act, 1867, to the Parliament of Canada. In their Lordships' opinion this contention should not prevail. It is true that in a series of cases, commencing with *Hearne v. Garton* (1) and ending with *Ex parte Schofield* (2), it has been held that the imposition of a fine or penalty (not being by way of reimbursement) for the breach of an order of a public authority is matter of criminal and not civil procedure. But in construing the British North America Act it is necessary to read ss. 91 and 92 together; and regard must be had to the fact that head 15 of the latter section gives to a Provincial Legislature exclusive power to make laws in relation to the imposition of punishment by fine, penalty or imprisonment for enforcing any law of

(1) (1859) 2 E. & E. 66.

(2) [1891] 2 Q.B. 428.

the Province made within the scope of its powers. It appears to their Lordships that the Act now in question falls within the latter provision and was therefore within the powers of the Legislature of Ontario.

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Secondly, it was contended that, as under the order of February 27, 1917, the first 100 additional cars were to be placed in operation not later than January 1, 1918, there was a complete breach of the order on that date, and accordingly there could not after that date be such a non-compliance with the order as to subject the company to the penalties authorized by the Act. Their Lordships are unable to agree with this contention. The substance of the thing to be done was, as pointed out by Meredith C.J. in giving the reasons for the decision of the Supreme Court, that the additional cars should be put in service. The limit of time was a further and subsidiary provision, and notwithstanding the breach of this latter provision, the direction to provide the cars remained in force.

But, thirdly, it was argued on behalf of the appellants that the order of April 19, 1918, was not authorised by the Act of 1918, as it was an order not for enforcing compliance with the order of February 27, 1917, but for punishing a past breach of the order; or, in other words, that the only order contemplated by the Act of 1918 was an order fixing a period within which some existing or future order should be complied with and imposing a penalty for every day of default after that period had elapsed. In their Lordships' opinion this is the true construction of the Act of 1918. The Board are authorised by s. 260a to impose penalties for non-compliance with their orders, but subject to the condition that such penalties must be imposed "for the purpose of enforcing compliance" with those orders; and this expression points, not to the summary imposition of a penalty for a past breach without previous warning, but to the imposition of a penalty in advance and for the purpose of procuring by means of such an inducement obedience to the order. The word "enforce" is ambiguous, and may according to its context refer either to the imposition of a fine or damages or to some process for procuring specific performance; but the expression "enforcing compliance" is more readily susceptible of the latter meaning (cf. *In re Royle* (1),

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where the expression was “enforce obedience”). Further, it is plain that the Act of 1918, although general in its terms, was passed with special reference to the liabilities of the Toronto Railway Company under the order of February 27, 1917; and it cannot be supposed that the Legislature of Ontario, knowing that a breach of that order had occurred and could not be remedied without some further allowance of time, intended to authorize the imposition of a daily penalty commencing from the day following that on which the Act became law. The Act, if construed so as to have that effect would bear too great a resemblance to *ex post facto* legislation, in their Lordships’ opinion it was not the intention of the Legislature that the Board should be authorized to impose penalties except after giving to the Railway Company a warning that after a specified period penalties would be imposed and an opportunity of avoiding them by compliance, within that period, with the requirements of the Board, and accordingly the order of April 19, 1918, was not authorized by the Act.

Apart from the above considerations, the procedure adopted by the Railway Board in making the order under appeal is open to question. The Railway Company appeared before the Board on April 19, 1918, for the purpose of pursuing the inquiry instituted by the Board on January 30, and for no other purpose. No claim had been made by the Corporation for penalties under the recent Act, no notice or summons had been given or issued by the Board which indicated that the question of penalties would come under consideration, nor was this question even referred to at any time before judgment was delivered. Their Lordships accept the view of the Railway Board that the Company were not prevented by war conditions from supplying the cars and were therefore gravely in default; but even so they were entitled, before being subjected to a heavy penalty, to have notice of the claim and an opportunity of meeting it. Whatever view, therefore, might be taken as to the construction of the Act, it seems doubtful whether the present order could stand.

The fourth point raised on behalf of the appellants was that, having regard to the powers conferred by statute on the Railway and Municipal Board, that body must be regarded as a “superior Court” within the meaning of s. 96 of the British North America Act, and accordingly

that the members of the Board should have been appointed by the Governor-General and not (as provided by s. 5 of the Railway and Municipal Board Act of Ontario) by the Lieutenant-Governor in Council. This question was fully considered by the Supreme Court and was decided by that Court against the appellants. But in consequence of the view taken by their Lordships on other points in the case it became unnecessary for them to consider it; and accordingly the point was not argued before the Board, and their Lordships express no opinion upon it.

For the above reasons their Lordships will humbly advise His Majesty that this appeal should be allowed, and that the order of the Railway Board dated April 19, 1918, and the order of the Supreme Court affirming that order should be set aside. The respondents will pay the costs of the appeal to the Supreme Court and of this appeal.

Solicitors for appellants: *Charles Russell & Co.*

Solicitors for respondents and intervener: *Freshfields & Leese.*

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PAQUET AND ANOTHER.....APPELLANTS;

AND

CORPORATION OF PILOTS FOR
AND BELOW THE HARBOUR
OF QUEBEC.....} RESPONDENTS.ATTORNEY-GENERAL FOR
CANADA.....} INTERVENER.ON APPEAL FROM THE COURT OF KING'S BENCH
FOR THE PROVINCE OF QUEBEC.*Canada (Quebec)—Pilottage Dues—Quebec Harbour—Right to collect Dues—Corporation of Pilots—Legislative Authority—British North America Act, 1867 (30 & 31 Vict. c. 3, Imp.), ss. 91, 92—23 Vict. c. 123 (Can.)—4 & 5 Geo. 5, c. 48 (Dom.), ss. 1, 2.*

The power of the Corporation of Pilots for and below the Harbour of Quebec under 23 Vict. c. 123 (Can.) to demand pilotage dues, and to call on pilots to hand over their earnings as received, is extinguished by 4 & 5 Geo. 5, c. 123 (Dom.). So held without deciding whether the Corporation can still demand from a pilot a contribution to the pilots' pension fund. The Dominion Legislature has power under the British North America Act, 1867, s. 91, head 10 (navigation and shipping), to enact laws which relate to pilotage, although they trench upon property and civil rights in a province.

Judgment of the Court of King's Bench reversed.

APPEAL by special leave from a judgment of the Court of King's Bench for Quebec (April 3, 1918) reversing a judgment of the Superior Court (November 2, 1917).

The respondent Corporation sued the first appellant, since deceased, in the Superior Court, to recover the amount earned by him for pilotage services during the season of navigation of 1917. The defendant pleaded that under the Dominion statute 4 & 5 Geo. 5, c. 48, he was entitled to retain for his own use and benefit the amount of his earnings over and above such sum as might be required for the pilots' pension fund. The relevant statutory provisions appear from the judgment of their Lordships.

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The trial judge (Dorion J.) dismissed the action. On appeal the Court of King's Bench (Archambeault C.J. and Lavergne, Carroll, and Pelletier JJ.; Cross J. dis-

**Present*:—VISCOUNT HALDANE, VISCOUNT CAVE, LORD DUNEDIN, LORD ATKINSON, and MR. JUSTICE DUFF.

senting) reversed the decision and gave judgment for the present respondents.

By the Order in Council granting special leave to appeal the Attorney-General for Canada was given leave to intervene to support the appeal.

1920. July 15, 16. *Newcombe K.C., Meredith K.C., and T. Mathew* for the appellants and intervener.

Macmaster, K.C. and *Hon. S. O. Henn Collins* for the respondents.

The arguments were directed to the meaning and effect of 4 & 5 Geo. 5, c. 48 (Dom.), and by-law No. 37 of the by-laws made under that Act and s. 443 of the Canada Shipping Act. The validity of the Dominion Acts above mentioned was not disputed.

July 22. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. In this case the Attorney-General for the Dominion of Canada has been made a co-appellant, as the appeal raises questions in which the Dominion Government has a direct interest.

In 1917 the respondent Corporation brought the action out of which the appeal arises, in the Superior Court of the Province of Quebec, against a pilot named Paquet, who was one of the members of the Corporation, to recover a sum of about 532 dollars, being the amount earned by him for services as a pilot of the Harbour of Quebec. In the Court of first instance Dorion J. decided for the defendant, but on appeal to the Court of King's Bench for the Province this decision was reversed by a majority of the learned judges of that Court, Cross J. dissenting. Paquet died subsequently, and his personal representative is the first appellant.

The plaintiff Corporation consists of the licensed pilots of the Harbour of Quebec and below. In 1860 they had been incorporated by a statute of the then Province of Canada. Under that statute the pilots had to hand over their earnings to the Corporation, and out of the fund so constituted the former were paid by the latter, who were to distribute the surplus among the pilots.

After the quasi-federal distribution of legislative powers which was effected by the British North America Act in

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1867, it is clear that the power to pass laws regulating the pilotage system of the harbour was given exclusively to the Dominion Parliament. Navigation and shipping form the tenth class of the subjects enumerated as exclusively belonging to the Dominion in s. 91 of the Act, and the second class in the section, the regulation of trade and commerce, is concerned with some aspects at least of the same subject. Whether the words "trade and commerce," if these alone had been enumerated subjects, would have been sufficient to exclude the Provincial Legislature from dealing with pilotage, it is not necessary to consider, because, in their Lordships' opinion, the introduction into s. 91 of the words "navigation and shipping" puts the matter beyond question. It is, of course, true that the class of subjects designated as "property and civil rights" in s. 92 and there given exclusively to the Province would be trencned on if that section were to be interpreted by itself. But the language of s. 92 has to be read along with that of s. 91, and the generality of the wording of s. 92 has to be interpreted as restricted by the specific language of s. 91, in accordance with the well-established principle that subjects which in one aspect may come under s. 92 may in another aspect that is made dominant be brought within s. 91. That this principle applies in the case before their Lordships they entertain no doubt, and it was, therefore, in their opinion, for the Dominion and not for the Provincial Legislature to deal exclusively with the subject of pilotage after confederation, notwithstanding that the civil rights and the property of the Corporation of Pilots of Quebec Harbour might incidentally, if unavoidably, be seriously affected.

The Dominion Parliament, after confederation, passed the Canada Shipping Act, now c. 113 of the Revised Statutes of Canada, 1906. Part 6 of that Act dealt with pilotage. By s. 411 the pilotage district of Quebec is defined, and by s. 413 the Dominion Minister of Marine and Fisheries is to be the pilotage authority, in whom all the powers of the Harbour Commissioners of Quebec are vested. By subsequent sections the Minister was given powers to regulate the qualifications of pilots, the management and maintenance of their boats and the distribution of their earnings, the performance of their duties, and, subject to the limitation referred to in the case of the Quebec District, the mode and amount of remunerating the pilots, and the establishment

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of superannuation funds; but the alteration of the rates for pilotage in the Quebec District and of the administration or distribution of their earnings was excluded from the power of the Minister by s. 434. For some purposes, other than those specifically conferred on the Minister, the respondent Corporation retained powers, and among them were rights in certain cases to demand from the masters of ships pilotage dues. Out of the sums thus received the treasurer of the respondent Corporation was to set aside 7 per cent. for a pilot fund, and the Corporation was to account to the Minister for the administration of this fund, which was due to be employed for superannuation purposes.

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It is, however, in their Lordships' view unnecessary to determine precisely what powers remained to the respondent Corporation after the passing of the Canada Shipping Act of 1906, for in 1914 another statute amending it was passed by the Dominion Parliament, and this statute applies in the case before them. It provides by s. 1 that the Minister, subject to the provisions of the general Canada Shipping Act, is to have charge of the control and management of the pilots and their boats for the pilotage district of Quebec, and of all questions respecting pilotage arising in connection with such district, and of the collection of pilotage dues in respect of such district; and that all powers vested in the Corporation of Pilots of Quebec under Part 6 of the Canada Shipping Act are transferred to and vested in the Minister. By s. 2 all powers of the Corporation of Pilots with respect to the management and control of pilots and their duties, the collection of pilotage dues and the management and control of pilotage, were thereby repealed. By s. 3 nothing in the Act was to be deemed to affect any power possessed by the Corporation in connection with the management and disposal of the pilot pension fund, but such power was to be exercised under the supervision of the Minister as theretofore.

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In their Lordships' opinion it is plain that whatever powers to demand dues, or to call on a pilot to hand over his earnings as received, may have survived to the respondent Corporation after the passing of the general Canada Shipping Act, are now extinguished by the first and second sections of the Act of 1914. What right the Corporation may have had as between itself and the original defendant Paquet to demand from him a contribution to the superannuation

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fund is not a question which is before their Lordships. It is enough for them to say that they are unable to take the view of the majority of the learned judges in the Court of King's Bench, that there is no repeal of the title of the respondent Corporation to receive the pilotage dues which a pilot may now earn. The result of the Act of 1914 is to get rid altogether of the old title of the Corporation, and to enable the Minister to direct that the payment shall be made to the pilot employed and no one else.

They will therefore humbly advise His Majesty that the judgment of the Court of King's Bench, which was in favour of the Corporation as plaintiffs, should be reversed and that of Dorion J., dismissing the action with costs, should be restored. The appellant Paquet will have his costs here, in so far as he has incurred costs, and in the Court of King's Bench. The Attorney-General for Canada, in accordance with the usual practice, will receive no separate costs.

Solicitors for appellants and intervener: *Charles Russell & Co.*

Solicitors for respondents: *Stephenson, Harwood & Co.*

[PRIVY COUNCIL.]

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RESPONDENTS.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR THE
PROVINCE OF QUEBEC.

Canada (Quebec)—Lands appropriated to Indians—Dominion or Provincial
Title—13 & 14 Vict. (Can.), c. 42, ss. 1, 2—British North America Act,
1867 (30 & 31 Vict. c. 3), s. 109—Sale of Crown Property by Sheriff—
Title of Purchaser—Code of Civil Procedure, arts. 399, 2213.

The title to lands in the Province of Quebec appropriated for the use of
Indians, pursuant to 14 & 15 Vict. (Can.), c. 106, and surrendered to the
Crown in 1882, passed to the Province under s. 109 of the B.N.A. Act,
1867. The effect of 13 & 14 Vict. (Can.), c. 42, was not to give the
Indians an equitable estate in the lands; the title remained in the Crown,
the Commissioner for Indian Lands being given such an interest as to
enable him to exercise the powers of management committed to him by
that statute.

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St. Catherine's Milling and Lumber Co. v. The Queen (1888) 14 App. Cas. 46
followed and applied.

Arts. 399 and 2213 of the Code of Civil Procedure of Quebec have not the
effect of conferring upon the purchasers at a sheriff's sale a title to Crown
property which has not been alienated by the Crown.

Commissaire d'Ecole v. Price (1895) 1 Rev. de Jur. 122 approved.

Judgment of the Court of King's Bench reversed.

APPEAL from a judgment (November 7, 1917) of the Court
of King's Bench for Quebec, Appeal Side, affirming a
judgment of the Superior Court.

The main question in the appeal was whether the title
to lands in the Province of Quebec appropriated in 1853 for
the use of Indians under 14 & 15 Vict. (Can.), c. 106, and
surrendered to the Crown in 1882, was in the Crown in the
right of the Dominion or in the right of the Province of
Quebec.

The question arose in an action brought in the Superior
Court by the second party appellant, the Star Chrome

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Mining Co., Ltd., against the second respondent, Dame Thompson. The Attorneys-General for the Dominion and for the Province intervened in the action.

There was a subsidiary question—namely, whether respondent Dame Thompson's title was in any case validated by the fact that she had purchased the property upon a sale in execution by the sheriff.

The facts of the case and the material enactments appear from the judgment.

The trial judge (Lafontaine J.) dismissed the action and the intervention of the Attorney-General for the Province. On appeal the Court of King's Bench, Appeal side (Cross, Carroll, Pelletier, and Roy JJ.; Lavergne J. dissenting), affirmed the decision of the trial judge.

July 29, 30, 1920. *Geoffrion K.C.* (*Lanctot K.C.* and *G. Lawrence* with him) for the appellant, the Attorney-General for Quebec. The lands reserved for Indians in the Province of Quebec became the property of the Province at confederation by virtue of s. 109 of the British North America Act, 1867; they were lands vested in the Crown at confederation subject to "an interest other than that of the Province" within the meaning of that section. The present case is not distinguishable from *St. Catherine's Milling and Lumber Co. v. The Queen* (1), in which it was held that lands reserved for Indians in Ontario vested in that Province. The Acts of the Parliament of Canada as to Indian reserves in Lower Canada—namely, 13 & 14 Vict. c. 42 and 14 & 15 Vict. c. 106—granted no rights other than usufructuary rights to the Indians. The Dominion of Canada had power to accept a surrender to the Crown of the Indians' rights, but had no power to take away from the Province the property in the lands assigned to the Province by the British North America Act. [Reference was made also to *Ontario Mining Co. v. Seybold* (2), *Attorney-General for Canada v. Attorney-General for Ontario* (3), and *Dominion of Canada v. Province of Ontario*. (4)]

St. Germain K.C. for the appellant company.

Sir John Simon K.C. and *Newcombe K.C.* (*James Wylie* with them) for the respondent, the Attorney-General for

(1) 14 App. Cas. 46.
(2) [1903] A.C. 73.

(3) [1898] A.C. 700.
(4) [1910] A.C. 637.

Canada. This case is distinguishable from *St. Catherine's Milling and Lumber Co. v. The Queen*. (1) As a result of 13 & 14 Vict. (Can.), c. 42, and 14 & 15 Vict. (Can.), c. 106, the position before and at the time of the passing of the British North America Act, 1867, was that lands reserved for Indians in Lower Canada were vested in the Commissioner on behalf of the Indians, and were not vested in the Crown. The Commissioner had all the rights of ownership, including a power of sale conditional upon the consent of the Indians. The Acts of the Parliament of Canada relative to Indian reserves in Upper Canada contained no similar provisions. Sect. 26 of 31 Vict. (Dom.), c. 42, provided that thenceforth the land should vest in the Crown; it therefore cannot be said that it vested earlier. As the effect of ss. 12, 65, and 130 of the British North America Act, 1867, the Commissioner became a Dominion official, and under s. 91, head 24 ("Indians, and land reserved for Indians"), the Dominion Legislature had exclusive power to pass laws relative to the sale of the lands, and the application of the proceeds, as was done by 31 Vict. c. 42. The surrender in 1882, unlike that in the *St. Catherine's Case* (1), was merely for the purpose of sale and for the purchase of other lands. Upon the surrender the lands became the unencumbered property of the Dominion with a full right of disposition, subject only to the obligation to apply the proceeds in the manner provided by the terms of the surrender.

St. Jacques K.C. for the respondent, Dame Thompson.

Geoffrion K.C. in reply. The title of the Indians in Quebec was no higher than the title under the proclamation of October 7, 1763, under which the lands were merely "set apart for the use of the Indians." Under s. 3 of 13 & 14 Vict. (Can.), c. 42, there was no restriction in the power of the Governor to deal with the lands; the Commissioner was merely a servant of the Government. If any transferable right was granted to the Indians, it was merely the right of use; there was no right to convert the lands into money. If the title of the Indians in Quebec was the same as in Ontario, the Dominion Government could not arrive at a different result in Quebec by dealing with the lands differently.

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(1) 14 App. Cas. 46.

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Nov. 23. The judgment of their Lordships was delivered by

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MR. JUSTICE DUFF. By an order of the Governor of the late Province of Canada in Council, of August 9, 1853, pursuant to a statute of that Province (14 & 15 Vict. c. 106), the provisions of which are hereinafter explained, certain lands, including those whose title is in question on this appeal—namely, lots 6, 7 and 8, in the thirteenth range of the township of Coleraine in the county of Megantic—were appropriated for the benefit of the Indian tribes of Lower Canada, those particularly mentioned being set apart for the tribe called the Abenakis of Becancour. By an instrument of surrender of February 14, 1882, which was accepted by an order of the Governor-General of Canada in Council of April 3, 1882, this tribe surrendered (inter alia) the lots above specified to Her Majesty the Queen; and on July 2, 1887, the Dominion Government professed to grant them by letters patent to Cyrice Tetu, of Montreal, whose interest in them passed on his death to Dame Caroline Tetu.

On April 10, 1893, the lands in question, having been seized in execution by the sheriff of the district of Arthabaska, under a judgment against Dame Caroline Tetu, were sold by the sheriff to one Joseph Lamarche, whose title was eventually acquired by the respondent Dame Rosalie Thompson. The appellants, the Star Chrome Mining Co., Ltd., having purchased the property from the respondent Dame Rosalie Thompson, in February, 1907, the company took proceedings against the vendor, claiming rescission of the sale and demanding repayment of the purchase money with damages, on the ground that the property was in the Crown in the right of the Province of Quebec, and that the vendor was consequently without title at the time of the sale.

The action of the appellants having come on for trial on June 4, 1909, the trial was adjourned, and on June 29, 1912, an order was made suggesting that the Dominion Government and the Government of Quebec should intervene for the purpose of determining the controversy touching the authority of the Dominion Government to dispose of the lands in question on behalf of the Crown. On October 2, 1914, the appellant, the Attorney-General of Quebec, intervened, claiming by his intervention that the grant to

Cyrice Tetu, of July 2, 1887, was null and void, on the ground that the lands which the grant professed to dispose of were the property of the Crown in the right of Quebec; and on October 7, 1914, the respondent, the Attorney-General of Canada, met the intervention of the Attorney-General of Quebec by a contestation in which he maintained the validity of the grant to Cyrice Tetu. On May 7, 1917, the Superior Court pronounced judgment rejecting the intervention of the Attorney-General of Quebec, and the appeal from this judgment was dismissed by the Court of King's Bench on November 20, 1917, Lavergne J. dissenting.

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The first question which arises concerns the effect of the deed of surrender of April 3, 1882—whether, that is to say, as a result of the surrender, the title to the lands affected by it became vested in the Crown in right of the Dominion, or, on the contrary, the title, freed from the burden of the Indian interest, passed to the Province under s. 109 of the British North America Act. 1921 1 A.C. p. 406.

The claim of Quebec is based upon the contention that at the date of Confederation the radical title in these lands was vested in the Crown, subject to an interest held in trust for the benefit of the Indians, which, in the words used by Lord Watson, in delivering judgment in *St. Catherine's Milling and Lumber Co. v. The Queen* (1), was only "a personal and usufructuary right dependent upon the goodwill of the Sovereign." On behalf of the Dominion it is contended that the title, both legal and beneficial, was held in trust for the Indians.

In virtue of the enactment of s. 91, head 24, of the British North America Act, by which exclusive authority to legislate in respect of lands reserved for Indians is vested in the Dominion Parliament, it is not disputed that that Parliament would have full authority to legislate in respect of the disposition of the Indian title, which, according to the Dominion's contention, would be the full beneficial title. On the other hand, if the view advanced by the Province touching the nature of the Indian title be accepted, then it follows from the principle laid down by the decision of this Board in *St. Catherine's Milling and Lumber Co. v. The Queen* (supra) (1) that upon the surrender in 1882

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of the Indian interest the title to the lands affected by the surrender became vested in the Crown in right of the Province, freed from the burden of that interest.

The answer to the question raised by this controversy primarily depends upon the true construction of two statutes passed by the Legislature of the Province of Canada in 1850 and 1851 (13 & 14 Vict. c. 42 and 14 & 15 Vict. c. 106). The last-mentioned statute is entitled, "An Act to authorise the setting apart of lands for the use of certain Indian tribes in Lower Canada," and, after reciting that it is expedient to set apart certain lands for such "use," it enacts that tracts not exceeding 230,000 acres may, under the authority of Orders in Council, be described, surveyed and set out by the Commissioner of Crown Lands, and that "such tracts of land shall be and are hereby respectively set apart and appropriated to and for the use of the several Indian tribes in Lower Canada, for which they shall be respectively directed to be set apart . . . and the said tracts of land shall accordingly, by virtue of this Act . . . be vested in and managed by the Commissioner of Indian Lands for Lower Canada, under" the statute first mentioned, 13 & 14 Vict. c. 42.

This statute (13 & 14 Vict. c. 42) is entitled "An Act for the better protection of the lands and property of the Indians in Lower Canada," and, following upon a recital that it is expedient to make better provision in respect of "lands appropriated to the use of Indians in Lower Canada," enacts (by s. 1) as follows: "That it shall be lawful for the Governor to appoint from time to time a Commissioner of Indian Lands for Lower Canada, in whom and in whose successors by the name aforesaid, all lands or property in Lower Canada which are or shall be set apart or appropriated to or for the use of any tribe or body of Indians, shall be and are hereby vested, in trust for such tribe or body, and who shall be held in law to be in the occupation and possession of any lands in Lower Canada actually occupied or possessed by any such tribe or body in common, or by any chief or member thereof or other party for the use or benefit of such tribe or body, and shall be entitled to receive and recover the rents, issues and profits of such lands and property, and shall and may, in and by the name aforesaid, but subject to the provisions hereinafter made, exercise and defend all or any of the rights lawfully

appertaining to the proprietor, possessor or occupant of such land or property." And by s. 3: "That the said Commissioner shall have full power to concede or lease or charge any such land or property as aforesaid and to receive or recover the rents, issues and profits thereof as any lawful proprietor, possessor or occupant thereof might do, but shall be subject in all things to the instructions he may from time to time receive from the Governor, and shall be personally responsible to the Crown for all his acts, and more especially for any act done contrary to such instructions, and shall account for all moneys received by him, and apply and pay over the same in such manner, at such times, and to such person or officer, as shall be appointed by the Governor, and shall report from time to time on all matters relative to this office in such manner and form, and give such security, as the Governor shall direct and require; and all moneys and movable property received by him or in his possession as Commissioner, if not duly accounted for, applied and paid over as aforesaid, or if not delivered by any person having been such Commissioner to his successor in office, may be recovered by the Crown or by such successor, in any Court having civil jurisdiction to the amount or value, from the person having been such Commissioner and his sureties, jointly and severally."

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The rival views which have been advanced before their Lordships touching the construction of these enactments have already been indicated.

In support of the Dominion claim it is urged that, as regards lands "appropriated" under the Act of 1851, the words "shall be and are hereby vested in trust for" the Indians, create a beneficial estate in such lands, which by force of the statute is held for the Indians, and which could not lawfully be devoted to any purpose other than the purposes of the trust, and indeed is equivalent to the beneficial ownership.

While the language of the statute of 1850 undoubtedly imports a legislative acknowledgment of a right inherent in the Indians to enjoy the lands appropriated to their use under the superintendence and management of the Commissioner of Indian Lands, their Lordships think the contention of the Province to be well founded to this extent, that the right recognized by the statute is a usufructuary

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right only and a personal right in the sense that it is in its nature inalienable except by surrender to the Crown.

By s. 3 the Commissioner is not only accountable for his acts, but is subject to the direction of the Governor in all matters relating to the trust; the intent of the statute appears to be, in other words, that the rights and powers committed to him are not committed to him as the delegate of the Legislature, but as the officer who for convenience of administration is appointed to represent the Crown for the purpose of managing the property for the benefit of the Indians. If this be the correct view, then, whatever be the nature or quantum of the Commissioner's interest, it is held by him in his capacity of officer of the Crown and his title is still the title of the Crown; and this, it may be observed, is apparently the view upon which the Dominion Government proceeded in accepting the surrender of 1882, the lands surrendered being treated (and their Lordships think rightly treated) for the purposes of that transaction as a "Reserve" within the meaning of the Act of 1882—in other words, as lands "the legal title" to which still remained in the Crown (s. 2, sub-s. 6). It is not unimportant, however, to notice that the term "vest" is of elastic import; and a declaration that lands are "vested" in a public body for public purposes may pass only such powers of control and management and such proprietary interest as may be necessary to enable that body to discharge its public functions effectively: *Tunbridge Wells Corporation v. Baird* (1), an interest which may become divested when these functions are transferred to another body. In their Lordships' opinion, the words quoted from s. 1 are not inconsistent with an intention that the Commissioner should possess such limited interest only as might be necessary to enable him effectually to execute the powers and duties of control and management, of suing and being sued, committed to him by the Act.

In the judgment of this Board in the *St. Catherine's Milling Co.'s Case* (2), already referred to, it was laid down, speaking of Crown lands burdened with the Indian interest arising under the Proclamation of 1763, as follows: "The Crown has all along had a present proprietary estate in

(1) [1896] A.C. 434.

(2) 14 App. Cas. 46, 55, 58.

the land, upon which the Indian title was a mere burden. The ceded territory was, at the time of the union, land vested in the Crown, subject to 'an interest other than that of the Province in the same,' within the meaning of s. 109; and must now belong to Ontario in terms of that clause, unless its rights have been taken away by some provision of the Act of 1867 other than those already noticed." And their Lordships said: "It appears to them to be sufficient for the purposes of this case that there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominium whenever that title was surrendered or otherwise extinguished."

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The language of the statutes of 1850 and 1851 must, therefore, be examined in light of the circumstances of the time and of the objects of the legislation as declared by the enactments themselves, for the purpose of ascertaining whether or not the Crown retained in lands appropriated for the use of an Indian tribe a "paramount title" upon which the Indian interest was a mere "burden" in the sense in which these phrases are used in these passages.

The object of the Act of 1850, as declared in the recitals already quoted, is to make better provision for preventing encroachments upon the lands appropriated to the use of Indian tribes and for the defence of their rights and privileges, language which does not point to an intention of enlarging or in any way altering the quality of the interest conferred upon the Indians by the instrument of appropriation or other source of title; and the view that the Act was passed for the purpose of affording legal protection for the Indians in the enjoyment of property occupied by them or appropriated to their use, and of securing a legal status for benefits to be enjoyed by them, receives some support from the circumstance that the operation of the Act appears to extend to lands occupied by Indian tribes in that part of Quebec which, not being within the boundaries of the Province as laid down in the Proclamation of 1763, was, subject to the pronouncements of that Proclamation in relation to the rights of the Indians, a region in which the Indian title was still in 1850, to quote the words of Lord Watson, "a personal and usufructuary right dependent upon the good-will of the Sovereign." It should be noted also that the Act of 1851, under which the lands in question

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were set apart, is plainly an Act passed with the object of setting lands apart "for the use" of Indian tribes, and that by the same Act the powers of the Commissioner of Indian Lands under the Act of 1850 are referred to as "powers of management."

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Their Lordships do not find it necessary to enter upon a consideration of the precise effect of the words of s. 3, investing the Commissioner with power to "concede," "lease" or "charge" lands or property affected by the statute. It is sufficient to say that, having regard to the recitals of the same statute and the language of the Act of 1851 just referred to, as well as to the policy of successive administrations in the matter of Indian affairs which, to cite the judgment of the Board in the *St. Catherine's Milling Co.'s Case* (1) had been "all along the same in this respect, that the Indian inhabitants have been precluded from entering into any transaction with a subject for the sale or transfer of their interest in the land, and have only been permitted to surrender their rights to the Crown by a formal contract, duly ratified at a meeting of their chiefs or head men convened for the purpose," their Lordships think these words ought not to be construed as giving the Commissioner authority to convert the Indian interest into money by sale or to dispose of the land freed from the burden of the Indian interest, except after a surrender of that interest to the Crown.

It results from these considerations, in their Lordships' opinion, that the effect of the Act of 1850 is not to create an equitable estate in lands set apart for an Indian tribe of which the Commissioner is made the recipient for the benefit of the Indians, but that the title remains in the Crown and that the Commissioner is given such an interest as will enable him to exercise the powers of management and administration committed to him by the statute.

The Dominion Government had, of course, full authority to accept the surrender on behalf of the Crown from the Indians, but, to quote once more the judgment of the Board in the *St. Catherine's Milling Co.'s Case* (2), it had "neither authority nor power to take away from Quebec the interest which had been assigned to that Province by the Imperial

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(1) 14 App. Cas. 46.

(2) 14 App. Cas. 54.

statute of 1867." The effect of the surrender would have been otherwise if the view, which no doubt was the view upon which the Dominion Government acted, had prevailed—namely, that the beneficial title in the lands was by the Act of 1850 vested in the Commissioner of Indian Lands as trustee for the Indians, with authority, subject to the superintendence of the Crown, to convert the Indian interest into money for the benefit of the Indians. As already indicated, in their Lordships' opinion, that is a view of the Act of 1850 which cannot be sustained.

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One further point remains. On behalf of the respondent Dame Rosalie Thompson it is contended that her title is validated by reason of the adjudication of the sheriff's sale. Their Lordships concur in the view which prevailed in *Les Commissaires d'Ecoles de Saint Alexis v. Price* (1), that arts. 399 and 2213 of the Code of Civil Procedure have not the effect of conferring upon the purchaser at a sheriff's sale a title to Crown property which has not been alienated by the Crown.

The appeal should, therefore, be allowed and the action remitted to the Superior Court to give judgment against the respondent Dame Rosalie Thompson for the amount of the purchase money and of the damages which, if any, she shall be found liable to pay to the appellants, the Star Chrome Mining Co., and their Lordships will humbly advise His Majesty accordingly.

The respondent Dame Rosalie Thompson will pay the costs of the Star Chrome Mining Co. here and in the Courts below. There will be no order as to the costs of other parties.

Solicitors for appellants: *Blake & Redden*.

Solicitors for respondents: *Charles Russell & Co.; Witham Roskell, Munster & Weld*.

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RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR THE
PROVINCE OF QUEBEC.

Canada (Quebec)—Tidal Water Fisheries—Power of Province to grant exclusive Licences—Right of Public—Regulative Power of Dominion—29 Vict. (Can.), c. 11, ss. 3, 6—British North America Act, 1867 (30 & 31 Vict. c. 3), s. 91, head 12.

Having regard to the public right of fishing declared by 29 Vict. (Can.) c. 11, s. 6, and previous enactments having force in the Province of Quebec, the Government of that Province has not power to grant the exclusive right of fishing in the tidal waters so far as navigable of the rivers, streams, gulfs, bays, straits, or arms of the sea of the Province and of the high sea washing its coasts; nor has the Legislature of the Province power to authorize the Government to do so. In so far as the soil is vested in the Crown in the right of the Province, the Government of the Province has exclusive power to grant the right to affix engines to the solum, so far as such engines and the affixing of them do not interfere with the right of the public to fish, or prevent the regulation of the right of fishing of private persons without the aid of engines.

Sect. 3 of 29 Vict. (Can.) c. 11, which empowered the Commissioner of Crown Lands to issue fishing leases, must be read with s. 6, which maintains the right of the public. The power no longer exists in its entirety, so far as it was regulative it passed to the Dominion under the British North America Act, 1867, s. 91, head 12. The Dominion power of regulation must be exercised so as not to deprive the Province or private persons of proprietary rights which they possess.

Attorney-General for British Columbia v. Attorney-General for Canada [1914] A.C. 153 applied.

Judgment of Court of King's Bench reversed.

APPEAL from a judgment (February 7, 1917) of the Court of King's Bench for the Province of Quebec upon questions submitted to that Court by the Lieutenant-Governor under art. 579 of R. S. Queb., 1909, and the amendments thereto.

1921 1 A.C.
p. 414. The questions submitted related to the right of the Provincial Government to grant exclusive fishing rights in the tidal waters of the Province, and are fully stated in

*Present: VISCOUNT HALDANE, VISCOUNT CAVE, LORD DUNEDIN, LORD ATKINSON, and MR. JUSTICE DUFF.

their Lordships' judgments together with the effect of the answers given by the learned judges. The judgments in the King's Bench were by a majority in favour of the Province, and are reported at Q.R. 26 K.B. 289.

1920. July 19, 20, 22, 23; Aug. 2, 3. *Sir John Simon K.C., Newcombe K.C. (Stuart Moore with them)* for the appellant. (1) The answer to each of the questions should have been in the negative. Questions relative to fishing rights in Canada have been considered by the Board in two cases. In the first, *Attorney-General for Canada v. Attorney-General for Provinces* (2), it was held that the British North America Act, 1867, s. 91, head 12, in giving to the Dominion legislative jurisdiction over fisheries did not confer a proprietary right therein, and that whatever proprietary rights were vested before confederation remained unaffected; the decision left open the question whether the proprietary right of fishing in tidal waters vested in the Provinces. In *Attorney-General for British Columbia v. Attorney-General for Canada* (3) it was held that the right of fishing in tidal waters in British Columbia was a right of the public (whether inhabitants of the Province or not) and not a proprietary right, and that consequently the Province had no power over it, either to grant exclusive rights of fishing or otherwise. The second decision is conclusive of this case, since in Quebec there is a public right of fishing in tidal waters at common law and by statute. The contention that Quebec in this respect is in a different position from British Columbia fails. First, because, whether or not under French law there was formerly a public right of fishing in navigable waters in Quebec, the right of the public to fish in "any of the harbours or roadsteads, creeks or rivers" was affirmed before confederation by a long course of legislation applying to Quebec. The first of these Acts was 28 Geo. 3 (Prov. of Queb.), c. 6, which is modelled on the English legislation with regard to Newfoundland sea fisheries (see 10 & 11 Will. 3, c. 25), and was passed in pursuance of the express instruction to the Governor dated January 3, 1775: see Shortt & Doughty's

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(1) It was agreed that having regard to the observations in *Attorney-General for British Columbia v. Attorney-General for Canada* [1914] A.C. 153, 174, the arguments should proceed as

though that part of the questions which related to the sea beyond low-water mark were omitted.

(2) [1898] A.C. 700.

(3) [1914] A.C. 153.

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Constitutional Documents, p. 486, § 36. A series of Acts similarly declaring the public right followed: (of Lower Canada) 47 Geo. 3, c. 12, 4 Geo. 4, c. 1, 9 Geo. 4, c. 42, 6 Will. 4, c. 57; (of United Canada) 4 & 5 Vict. c. 36, 20 Vict. c. 21, 29 Vict. c. 11. Sect. 6 of the last named Act is headed "Deep Sea Fisheries," and clearly applies to fishing in tidal waters. After confederation the Dominion Parliament by 31 Vict. c. 60, s. 3, while repealing (by s. 20) the last named Act, by s. 3 reaffirmed the right of the public. This Act by s. 2 replaced the power of leasing contained in 29 Vict. c. 11, s. 3, by a similar power in the Minister of Marine, omitting such part of the repealed section as trenching upon rights of property in the Province. That provision was valid under s. 91, head 12. Secondly, conceding that French law is applicable generally to rights of property in Quebec, the right of fishing in tidal waters is not a proprietary right. Further, it is at least doubtful whether the French kings had a prerogative right to grant fishing in tidal waters: see Dalloz Repertoire, "eaux" No. 4, "pêche maritime" No. 2; Valin, Ordonnance de la Marine, vol. ii., p. 691; Pothier (ed. Bugnet), vol. ix., p. 121, "propriété." But in any case that prerogative, if it existed, did not survive to the English Crown; the public right became exercisable in Quebec as in other territory under British sovereignty: per Day J. in *Seigniorial Questions* (Lower Canada Reports, B. 50 e); *Pollard v. Hagan*. (1) The Civil Code of Quebec by art. 567 recognizes the right of fishing as a branch of public law: see also sixth Report of Codifiers, p. 226.

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The objection in the first *Fisheries Case* (2) to the power of leasing contained in s. 2 of the Dominion statute 31 Vict. c. 60 was that it extended to inland fisheries and consequently to property vested in the Provinces, an objection removed by R.S. Can., 1906, c. 45, s. 8. The judgment does not support the view that tidal fisheries are a proprietary right of the Provinces. The Provincial Legislature is not competent to displace the public right declared and enacted by 29 Vict. c. 11, s. 6, and cannot use any power which survived to it under s. 3 to destroy that right: *Attorney-General for Ontario v. Attorney-General for the Dominion*. (3) If the power of leasing in 29 Vict.

(1) (1844) 3 Howard, 212, 225.

(2) [1898] A.C. 700, 714.

(3) [1896] A.C. 348, 362, 363.

c. 11, s. 3, operated to destroy the public right in Quebec it equally did so in Ontario.

Lanctot K.C. and *Geoffrion K.C.* (*G. Lawrence* with them) for the respondent. The Parliament of Canada by 29 Vict. c. 11, s. 3, recognized as existing in, and granted to, the Crown the power to issue exclusive leases in respect of fishing in Upper and Lower Canada. That power, which could be exercised as to tidal waters, existed at the union in 1867, and passed by the British North America Act to the Provinces concerned, either as a "royalty" or a proprietary right under ss. 109 and 117, or by a transference to the Lieutenant-Governor under ss. 12 and 65, unless there was, as in British Columbia, such a right of the public to fish in tidal waters as was incompatible with the exercise of the powers to lease. In Quebec the right of fishing was never subject to the English common law; under French law no public right of fishing existed. The French kings frequently granted exclusive rights of fishing in tidal waters in Quebec; those grants have been upheld by a series of decisions in Quebec, and are recognized as valid by the series of Acts referred to by the appellant. The views of Valin and Dalloz on this question are not applicable in Quebec, because they are based upon the Ordonnance de la Marine of 1681, which was not registered in Quebec, and consequently was not effectual there. If there was any public right of fishing in tidal waters in Quebec it was not, as in British Columbia, a right which was destructive of the right of the Crown. As in the case of lands reserved for the use of Indians, it was merely a burden upon the Crown's title; the title of the Crown so burdened passed to the Province: *St. Catherine's Milling and Lumber Co. v. The Queen*. (1) The right of the public under s. 6 of the Act of 1865 is expressly declared to be subject to the right to lease given by s. 3. The latter right cannot be treated as merely a matter of regulation, for s. 4 expressly gives a right to make regulations, and treats the power to lease as a power different from the right to regulate. Sect. 17 treats persons other than lessees fishing in leased areas as trespassers. The right to lease was a right for revenue purposes and was reserved to the Province in 1867 as a proprietary right. The residual legislative power as to

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proprietary rights is in the Provinces, the onus is therefore on the appellant. It is conceded that under s. 91, head 12, of the British North America Act, 1867, the Dominion may make regulations which are burdensome to the lessees from the Province. In any case the questions should be answered in favour of the Province so far as they relate to "engines fixed to the soil."

Sir John Simon K.C. in reply. Whether or not the rights of the Crown with regard to fishing in tidal waters in Quebec differed in character from those in British Columbia there was in each Province a public right of fishing. If there was a public right then the judgment in *Attorney-General for British Columbia v. Attorney-General for Canada* (1) is conclusive whatever power of leasing may have existed. The right to lease was merely regulative. In England the public right exists although the authorities under the power of regulation have power to, and do, prohibit fishing in certain areas. The power of leasing in 29 Vict. c. 11, s. 3, cannot be read as excluding the public right having regard to the express language in which that right is declared by s. 6. The public right is not qualified by s. 3, though its exercise may be limited by such leases as were validly granted under the section. With regard to the old French law a *Réglement* of 1717 (2), which was registered in Quebec, applied the *Ordonnance de la Marine* to the French colonies. Valin shows that the boundary of sea-fishing, to which alone the *Ordonnance* applied, extended as far as the tidal flow. With regard to "engines fixed to the soil," the matter falls within s. 91, head 12.

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Nov. 30. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. The controversy in this case arises over the answers to certain questions relating to the right of fishing in the tidal waters of the Province of Quebec. These questions were submitted to the Court of King's Bench of the Province by the Lieutenant-Governor in Council, who so submitted them under authority conferred on him by a statute of Quebec.

The questions were these: 1. Has the Government of the Province of Quebec, or a member of the Executive Council

(1) [1914] A.C. 153, 175.

(2) Edits, *Ordonnances*, roy-aux, etc. (Quebec, 1854), p. 358.

of the Province, power to grant the exclusive right of fishing, either by means of engines fixed to the soil, or in any other manner, in the tidal waters of the rivers, streams, gulfs, bays, straits or arms of the sea of the Province, and of the high seas washing its coasts, to a distance of three marine miles from the shore: (a) between high-water mark and low-water mark; (b) beyond low-water mark, and if in the affirmative, to what extent?

2. Can the Legislature of the Province authorize the Government of the Province, or a member of the Executive Council of the Province or any other person, to grant the exclusive rights of fishing set forth in the preceding question.

3. If there existed heretofore, or if there still exist, restrictions upon the granting of exclusive rights of fishing in the tidal waters as aforesaid, and if such restrictions have been or are abolished, are the fisheries in such waters, after such abolition, the property of the Province, and has the Legislature or the Government of the Province, or a Minister of the Government, or any other person the powers mentioned in the preceding question with regard to these fisheries?

The learned judges of the Court of King's Bench of Quebec, by a majority consisting of the Chief Justice (Sir Horace Archambeault), Trenholme, Lavergne and Carroll JJ. answered all these questions in the affirmative. The Chief Justice, however, so answered the first question subject to a reservation as regards waters beyond low-water mark out to the three-mile limit, regarding which he was of opinion, following an expression of view by their Lordships in a previous case, that no deliverance on a subject which was one of international law, ought under the circumstances to be made. He inserted a similar qualification into his answer to the third question. Cross J., who also heard the case, dissented as to the general principle laid down by his colleagues, expressing an opinion in the negative on the two first questions, and treating the third question as consequently not arising.

The questions thus raised relate to the Province of Quebec, where the common law is based on that of France, and it is the circumstance that the common law of the Province is different from that which obtains in the rest of Canada that gives rise to a distinction which has to be

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kept in mind. If the common law of Great Britain had obtained, the points that have arisen would have been covered in some measure by their Lordships' decision in the appeal from British Columbia: *Attorney-General for British Columbia v. Attorney-General for Canada* (1), which applied principles previously laid down by the Board in *Attorney-General for Canada v. Attorneys-General for Provinces*. (2) It is accordingly desirable before proceeding further to refer to the principles which were laid down in the appeals in these two cases.

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The decision of 1898 was concerned with a number of questions between the Dominion and the Provinces relating to rights of property and to legislative jurisdiction. It was pointed out that the proprietary right in the solum of Canada was vested in the Crown, whether the legislative and executive control is with the Dominion or with the Province, and that there is no presumption because legislative jurisdiction has been conferred on the Dominion that therefore a proprietary title has been conferred on it. What the Board on that occasion had to determine was, among other things, whether the beds of rivers and other waters situate within the territorial limits of a Province and not granted before confederation, belonged to the Crown in right of the Dominion or of the Province. The answer was that, generally speaking, the proprietary title to these beds, excepting where expressly transferred, remained provincial. It followed that the fishing rights, so far as they depended on property, were likewise provincial. But to the Dominion had been given by s. 91 of the British North America Act, 1867, exclusive legislative jurisdiction over sea coast and inland fisheries. This power to legislate was so sweeping in its terms that it could extend to what practically might be a modification of the character of the proprietary title of a Province, and it was not possible to lay down in abstract terms a priori a limit to this power of legislation. All that Lord Herschell could say in delivering their Lordships' opinion was that if the Dominion were to purport to confer on others proprietary rights which it did not itself possess, that would be beyond its power. In other words, the capacity conferred by s. 91 extended to regulation only, however far regulation might proceed.

(1) [1914] A.C. 153.

(2) [1898] A.C. 700.

It included the capacity to impose taxes for licences to fish. But the Dominion had no power to pass legislation purporting directly to grant a lease of an exclusive right to fish in property that did not belong to it, however much it might in other forms impose conditions on the exercise of the right to make such a grant. It was added that the enactment of fishery regulations and restrictions was within the exclusive competence of the Dominion Parliament, and was therefore not within the legislative power of any Province, although that Province might well have power, under the capacity that belonged to it under s. 92, to deal with property and civil rights within the Province, to pass statutes relating to modes of conveyance, or prescribing the terms and conditions upon which the fisheries that were the property of the Province might be granted, leased, or otherwise disposed of, or relating to succession to a provincial fishing right; for such legislation would be concerned only with proprietary title.

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In the appeal decided in 1914: *Attorney-General for British Columbia v. Attorney-General for Canada* (1), the principles laid down in the judgment of 1898 were further developed in their application. It was held that it was not competent for the Legislature of British Columbia to authorize the Government of the Province to grant exclusive rights of fishing in tidal waters or in the sea, including arms of the sea and estuaries of rivers. It was laid down that in the sea, wherever the common law of England applies, the right of fishing is a public right, not dependent on a proprietary title, and that consequently the regulation of the right must rest exclusively with the Dominion Parliament. In the case of an inland lake or river, or other non-tidal water, where the solum is vested in a private owner or the Crown, the public in British Columbia have no such right. The fisheries are mere profits of the soil over which the water flows, and the title to fish follows the title to the solum, unless it has been severed and turned into an incorporeal hereditament of the nature of a profit a prendre in alieno solo. With such inland fisheries it is of course only by way of regulation that the Dominion Parliament can interfere. Their Lordships were chiefly concerned in the decision under discussion with the right of fishing in tidal

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waters and in the sea. So far as these waters were concerned, the right of fishing in them was by English law a public and not a proprietary right, and was accordingly held to be subject to regulation by the Dominion Parliament only. So far as concerned waters which were navigable but non-tidal no question arose; for, as English law governed, the fishing in navigable non-tidal waters was the subject of property, and there was no right in the public generally to fish in them. As to the sea between low-water mark and the three-mile limit, although no doubt was raised as to the right of the public to fish there, it was pointed out that the question of the title to the subjacent soil within this zone stood in a very different position. The topic was not one that belonged to municipal law alone, for rights of foreign nations might be in question, and accordingly their Lordships did not deem it desirable that they should deal with it judicially, sitting as they did for the purpose of deciding the question of municipal law only.

Whatever the origin and character of the title of the public to fish in tidal waters, that title had, as their Lordships observed, been made unalterable, except by a Legislature possessing competent authority, since Magna Charta. And as Magna Charta had come to form part of the common law of England, it was part of the law of British Columbia. In speaking of the public right of fishing in tidal waters, their Lordships were careful to point out that they did not refer to fishing by way of kiddles, weirs, or other engines fixed to the soil. For such methods of fishing involved a use of the solum which, according to English law, cannot be vested in the public, but must belong to the Crown or to a private owner. They added that the question whether non-tidal waters were navigable or not did not bear on the question they had to decide; for the fishing in non-tidal navigable waters was the subject of property, and, according to English law, must have an owner and cannot be vested in the public generally. They held that, because the right of fishing in the sea is a right of the public generally which does not depend on any proprietary title, the Dominion must have the exclusive right of legislation with regard to it as such, and that accordingly the Province of British Columbia could not confer any exclusive or preferential right of fishing on individuals or classes of individuals.

The questions which their Lordships were called on to decide in 1914 were in certain important respects different from those now before them. In the first place, the questions then raised related to rights of fishing in British Columbia, where, as has been remarked, the common law applicable was that of England, whereas the common law applicable in Quebec is, generally speaking, the old French law, as it was introduced into the territory of the Province when it was subject to the rule of the King of France. The provisions of Magna Charta, now the foundation of the public right wherever the common law of England prevails, could in that case have no application to Quebec. In the second place, under that old French law, it may be that the distinction was not between tidal and non-tidal waters, but between those waters that were navigable and those that were not.

But the French law applicable to the Province of Quebec, so far as concerns the right of the public to fish in the waters of the Province, has been modified by certain statutes competently passed to which reference will presently be made. Into the precise character of the old French law it will be found that these statutes render it unnecessary to enter for the purposes of the present appeal. Under the French régime the custom of Paris was in force in the Province, and the Government of French Canada was modelled on that of a province of France. If it were necessary to pursue the character of the French law from time to time applicable, it would have to be considered whether any part of the Ordinance, sometimes spoken of as the Code de la Marine of 1681, which declared all the subjects of the King of France to have the right of fishing in the sea and on its banks, was ever so registered as to become law in French Canada, a point which conceivably may still require investigation in view of materials which were brought to their Lordships' notice in the course of the argument. It might also be necessary to determine whether, on the cession of Canada to England in 1763, the French law as to the Royal prerogative was abrogated and the law of England substituted for it. Into this historical question, which is one over which there has been much controversy, it is, however, unnecessary to enter. For assuming that the right of fishing in navigable waters belonged, under French law, to the domain of the Crown,

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and that the public enjoyed the right of fishing in such waters only subject to the prerogative of the King of France to grant at his pleasure exclusive rights of fishing to individuals, it is plain that this state of the law was altered by local statutes passed after the cession of 1763.

In order to find the powers under which these statutes were enacted, reference must be made to the relevant Acts of the Imperial Parliament. The first of these was the Quebec Act of 1774. This Act defined the boundaries of the large Province of Canada which had been called Quebec in the Royal Proclamation that followed on the cession effected by the Treaty of Paris. It then went on to declare that notwithstanding previous proclamations, commissions, ordinances, etc., in all matters of controversy relative to property and civil rights, resort was to be had to the existing laws of Canada as the rule for their decision, unless varied by ordinances passed by the Governor with the advice and consent of a Legislative Council to be set up by the Crown. The criminal law was to be that of England. The effect of the Act was thus to retain or to reintroduce the old French law wherever applicable as to property and civil rights.

In 1791, under another Act of that year, the Province of Quebec was divided into the separate Provinces of Upper and Lower Canada, and large powers of legislation were granted. The existing laws were to remain in force until altered, but power was given to the new Government to make laws for the peace, welfare and good government of their Provinces.

In 1840, by a subsequent Act, the two Provinces were united into the single Province of Canada, which remained as such until confederation in 1867. This united Province possessed representative government from the beginning, and a little later on its government was made responsible also.

Acting under the powers conferred on it, the Province of Quebec from time to time had passed laws regulative of fisheries. In 1788 a statute was enacted which declared that all the King's subjects should have the right to fish and to use the shores for that purpose over a large part of the river St. Lawrence and another river which emptied itself into the Bay of Chaleurs. The right extended to

rivers, creeks, harbours and roads. This statute, in conferring the right to fish on the King's subjects generally, in the language it adopted, substantially followed the model afforded by the Newfoundland Fisheries Act of 1699, in which the policy of encouraging the people of Great Britain to go to Newfoundland, catch fish, and dry them on the shores and bring them back, was adopted. This policy explains the stress laid in the statute on fishing in the sea and using the banks for drying, etc. It extends, however, to the right to take bait and fish in rivers, lakes, creeks, harbours and roads generally, and rights similar for the purposes of this appeal were conferred by the series of fishery statutes passed in Canada in relation to Canadian waters.

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In 1807 a further statute was passed by the Government of the Province of Lower Canada under which the right to fish and land was further extended, with the saving of rivers, creeks, harbours, roads, and land which had been made private property by title derived from the King of England, or by grant prior to 1760, or by location certificate. In 1824 a similar Act was passed extending the right of the public to fish to the Inferior District of Gaspé and two named counties. Further Acts regulating the rights of fishing in the District of Gaspé were passed in 1829 and 1836, by the Legislature of Lower Canada. In 1841, after the union of Upper and Lower Canada, the right of all the King's subjects to fish in the waters of Gaspé was reaffirmed, and in 1853 the Legislature of the Province of Canada further declared the right of the King's subjects to fish to extend to the Gulf of the St. Lawrence. In 1857 an Act of the Province anew declared the right of the King's subjects to fish in all the waters and rivers of the Province, with the exception of rivers lying within the territory known as the King's Posts, as to which it was provided that the Governor in Council might grant permission to fish in these rivers. In 1858, by another statute of the Province of Canada, the general right of the King's subjects was reaffirmed; but it was provided that the Governor-General might grant special fishing leases and licences for lands belonging to the Crown, for any term not exceeding nine years, and might make such regulations as should be found necessary or expedient for the better management and regulation of the fisheries of the Province.

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In 1865 the Provincial Government of the united Provinces passed an Act for the amendment of the law and for the better regulation of fishing and protection of fisheries. It applied to the whole of Upper and Lower Canada without distinction between districts. By this statute the Commissioner of Crown Lands might, under s. 3, where the exclusive right of fishing did not already exist by law in favour of private persons, issue fishing leases and licences for fisheries and fishing wheresoever situated or carried on, and grant licences of occupation for public lands in connection with fisheries; but leases or licences for any term exceeding nine years were to be issued only under the authority of an order of the Governor-General in Council. By s. 4 the Governor in Council might from time to time make regulations for the better management and regulation of fisheries, to prevent the obstruction and pollution of streams, to regulate and prevent fishing, and to prohibit fishing except under leases and licences. By s. 6, which is headed "Deep Sea Fisheries," it was in the first place declared that every subject of the Sovereign might use vacant public property for the purpose of landing, salting, curing and drying fish, etc., and that: "All subjects of Her Majesty may take bait or fish in any of the harbours or roadsteads, creeks or rivers; subject always, and in every case, to the provisions of this Act as affects the leasing or licensing of fisheries and fishing stations, but no property leased or licensed shall be deemed vacant." Sect. 17 prohibits fishing in areas described in leases or licences now existing or hereafter to be granted. It, however, adds that the occupation of any fishing station or waters so leased or licensed for the express purpose of net fishing is not to interfere with the taking of bait used for cod fishing, nor prevent angling for other purposes than those of trade or commerce.

In 1867 the British North America Act was passed, and in 1868 the Dominion Parliament repealed the Act of 1865 by s. 20 of its Fisheries Act of 1868. The Act of 1865 was thus in force only for three years. Sect. 91 of the British North America Act, 1867, had conferred on the Dominion Parliament exclusive authority to legislate in regard to sea coast and inland fisheries, and it was under this authority that the repeal was effected. By the Fisheries Act of 1868 that Parliament sought to exercise its powers by enacting

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a number of provisions in many respects resembling those of the Act of 1865, and by further regulating the exercise of both public and private rights of fishing throughout the Dominion. The substance of this Act was incorporated into the subsequent Consolidated Statutes of Canada on the subject of fisheries. As to one of the sections, s. 4 of the then Revised Statutes of Canada, c. 95, so far as it purported to empower the grant of fishery leases conferring an exclusive right to fish in property belonging not to the Dominion but to a Province, it was held by this Board, in the case before them in 1898, that the Dominion had no power to pass it. Their Lordships think that this is now settled law.

But the decision of this point does not conclude the question before them, which is not whether the Dominion has power to grant exclusive rights of fishing in waters the property of a Province, but whether the provincial Government has power to grant such an exclusive right of fishing in tidal waters. When the Act of 1865 was passed, the Government of the united Provinces of Upper and Lower Canada could unquestionably confer on itself the capacity to do this. For it had full power to make laws for the peace, order, and good government of the Provinces without any such restrictions as affected the right of a Province under the British North America Act, 1867, and it could consequently abrogate the fishing rights not only of private persons but of the public. After confederation, neither the Dominion nor any Province possessed this power in its integrity. The Dominion Parliament, having exclusive jurisdiction over sea coast and inland fisheries, could regulate the exercise of all fishing rights, private and public alike. As the public right was not proprietary, the Dominion Parliament has in effect exclusive jurisdiction to deal with it. But as to private rights, the provincial Legislature has exclusive jurisdiction so long as these present no other aspects than that of property and civil rights in the Province, or of matter of a local or private nature within it, in the meaning of the words of s. 92.

The result of this is that a Province cannot grant exclusive rights to fish in waters where the public has the right to fish. Now this right in the public was created by the series of statutes enacted in the old Province of Upper and Lower Canada prior to confederation, and as it continued to exist at confederation, only the Dominion could deal with

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it. As this Board said in the British Columbia case in 1914, the object and effect of the provisions of s. 91 were to place the management and protection of the cognate public rights of navigation and fishing in the sea and tidal waters exclusively in the Dominion Parliament and to leave to the Province no right of property or control in them. These rights, as was observed, are rights of the public in general, and in no way special to the inhabitants of the Province. Even under the guise of their taxing powers the Government of the Province could not confer any exclusive or preferential rights of fishing on individuals or classes of individuals, because such exclusion or preference would import regulation and control of the general right of the public to fish.

It is true that the public right of fishing in tidal waters does not extend to a right to fix to the solum kiddles, weirs or other engines of the kind. That is because the solum is not vested in the public, but may be so in either the Crown or private owners. It is also true that the power of the Dominion does not extend to enabling it to create what are really proprietary rights where it possesses none itself. But it is obvious that the control of the Dominion must be extensive. It is not practicable to define abstractly its limits in terms going beyond those their Lordships have just employed. The solum and the consequent proprietary title to the fishery may be vested in the Crown in right of the Province or in a private individual, and in so far as this is so it cannot be transferred by regulation. But regulation may proceed very far in limiting the exercise of proprietary rights without ceasing to be regulative.

1921 1 A.C. p. 429. It thus appears that the question which arises in this appeal in reality bears a considerable analogy to that which arose in the British Columbia case. It is true that here their Lordships have nothing to do with the public title arising out of the English common law and strengthened by Magna Charta. But on the other hand, the main consideration, although not concerned with the common law of England, is not the old French law. It is the state of the public title established by the series of statutes passed by a former Canadian Legislature which had power to abrogate all such law. That series culminated in the Act of 1865, and s. 6 of that Act, which declares that the public have the right, subject to the power of the Government to grant

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exclusive leases and licences, to fish in the harbours, roadsteads, creeks or rivers of the old Province of Canada, is the foundation of the public title. This section occurs with the heading "Deep Sea Fisheries," a heading which, in their Lordships' opinion, affects its scope. The language of the section obviously owes its origin to that used in the Newfoundland Fisheries Act, 1699, which, as has been said, was passed for the purpose of encouraging the King's subjects at home to sail to Newfoundland in order to fish. The distinction between coast and inland fisheries could hardly at that time have been an important one, and no distinction was then drawn. There is, however, one significant difference between the enumeration in the Act of 1699 of the waters in which the public may fish and that contained in s. 6 of the Act of 1865. In the former the word "lakes" occurs; in the latter it does not. The introduction into the language of the statute of the heading to s. 6, "Deep Sea Fisheries," when taken in conjunction with the omission of lakes, which are referred to elsewhere in the Act, indicates, in the view their Lordships take of this section, that it was intended to apply only to such fisheries as were either "deep sea," or so accessible from the sea as to make them natural adjuncts to these fisheries. The fisheries to be regarded as so adjoining would not, accordingly, include either the fishing in inland lakes, which are not mentioned, or the right to fish in non-navigable waters. All tidal waters which were navigable would thus be included. Stated generally the test of inclusion appears to be whether the waters in question are such that those who resort to the sea coast to fish there would naturally have access to these waters and would in ordinary course conduct their fishing operations in such a fashion as to extend into them.

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As to s. 3 of the Act of 1865, which enables the Commissioner of Crown Lands, where the exclusive right of fishing does not exist by law in favour of private persons, to issue fishing leases and licences for fisheries and fishing wherever carried on, this was obviously within the competence of the Legislature which was then unrestricted in the scope of its power to alter the provincial law. No distinction was, or needed to be, contemplated between power of regulation and power over proprietary title. Bearing this in mind, their Lordships think that s. 3 was in its character as much a regulative provision as it was one directed to property.

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These two aspects of its subject matter were really then inseparable. In so far as its powers were powers of regulation, they have passed to the Dominion Parliament. No question is at present raised as to existing rights created under any of its provisions. Although the power of the Dominion to legislate about the regulation of inland fisheries extends to all fisheries, even where the public has no right, it is obvious that in substance its powers may be more restricted in their operation wherever the only title to fish is a private one arising simply out of the property in the subjacent soil.

1921 1 A.C.
p. 431. In the Court of King's Bench of Quebec, the first of the questions raised in this appeal was answered by the majority of the learned judges to the effect that the Government of the Province did possess power to grant exclusive rights of fishing in tidal waters. The Chief Justice thought that the effect of the Act of 1865 was that the public right to fish had been abrogated. This seems to import that s. 3 had brought about a transfer of the entire title to fish to the Crown in right of the Province. Their Lordships are unable to concur in this view. They think that s. 3 must be read along with s. 6, which maintains the public right. No doubt that is maintained subject to the powers given in s. 3, and those powers might have been so exercised as to destroy the public right in a certain place. But if so exercised they would be fulfilling a double function; the disposal of property and the exercise of the power of regulation. The former of these functions has now fallen to the Province, but the latter to the Dominion; and accordingly the power which existed under s. 3 of the Act of 1865 no longer exists in its entirety.

Exclusive rights actually granted while the Act of 1865 was in force are another matter. It has not been brought to the notice of their Lordships that any such have been granted. If there are their position will have to be separately considered.

The Chief Justice, following their Lordships' view, expressed in the British Columbia case, declined to answer so much of any of the questions raised as related to the three-mile limit. As to this their Lordships agree with him. It is highly inexpedient, in a controversy of a purely municipal character such as the present, to express an opinion

on what is really a question of public international law. If their Lordships thought it proper to entertain such a question they would have directed the Home Government to be notified, inasmuch as the point is one which affects the Empire as a whole.

In the result the answer to the questions submitted must be as follows: (1.) To the first question, neither the Government of Quebec, nor any member of the Executive Council, has power to grant the exclusive right of fishing in the tidal waters so far as navigable of the rivers, streams, gulfs, bays, straits or arms of the sea of the Province and of the high seas washing its coasts. In so far as the soil is vested in the Crown in right of the Province, the Government of the Province has exclusive power to grant the right to affix engines to the solum, so far as such engines and the affixing of them do not interfere with the right of the public to fish, or prevent the regulation of the right of fishing by private persons without the aid of such engines. The tidal waters may not extend so far as the limits of the navigable waters, but no distinction between the two descriptions is enacted in the statute of 1865, which is the governing authority. There is everywhere a power of regulation in the Dominion Parliament, but this must be exercised so as not to deprive the Crown in right of the Province or private persons of proprietary rights where they possess them. This answer applies to waters between low and high mark. As to waters beyond low mark no answer can properly be given.

(2.) To the second question, as to the power of the Legislature of the province, the answer is in the negative.

(3.) To the third question, the answer is that restrictions in the interest of the public on the granting of exclusive rights of fishing in tidal waters still exist, and that therefore the question does not arise.

Their Lordships will humbly advise His Majesty accordingly. There will, following the general practice, be no costs of this appeal.

Solicitors for appellant: *Charles Russell & Co.*

Solicitors for respondent: *Blake & Redden.*

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APPELLANTS;

AND

THE KING.....

RESPONDENT.

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CANADA.....}

INTERVENER.

[AND CONSOLIDATED APPEALS.]

ON APPEAL FROM THE SUPREME COURT OF CANADA,
AND
ON APPEAL FROM THE SUPREME COURT OF ONTARIO,
APPELLATE DIVISION.

Canada—Legislative Powers—Dominion Companies—Provincial Legislative Restrictions—Licence to carry on Business in Province—Holding of Land—Companies Act (R. S. Can., 1906, c. 79), ss. 5, 29—Extra-Provincial Corporations Act (R. S. Ont., 1914, c. 179)—Companies Act (R. S. Man., 1913, c. 35), Pt. IV.—Companies Act Stat. Sask., 1915, c. 14—Mortmain and Charitable Uses Act (R. S. Ont., 1914, c. 103)—British North America Act, 1867 (30 & 31 Vict. c. 3), ss. 91, 92.

A company incorporated by the Dominion under the Companies Act of Canada (R. S. Can., 1906, c. 79), with power to trade in any Province may, consistently with ss. 91 and 92 of the British North America Act, 1867, be subject to Provincial laws of general application, such as laws imposing taxes, or relating to mortmain or requiring licences for certain purposes, or as to the form of contracts; but a Provincial Legislature cannot validly enact for the enforcements of such laws sanctions which if applied would sterilize or destroy the capacities and powers which the Dominion has validly conferred.

Accordingly, the Extra-Provincial Corporations Act (R. S. Ont., 1914, c. 179), the Companies Act (R. S. Man., 1913, c. 35), and the Companies Act (Stat. Sask., 1915, c. 14), so far as they purport to preclude Dominion trading companies from carrying on their business in the Province unless registered or licensed thereunder, or subject such companies to penalties for so carrying on business, are ultra vires.

Sect. 29 of the Companies Act of Canada (R. S. Can., 1906, c. 79), which purports to enable a Dominion company to acquire and hold real estate requisite for the carrying on of its undertaking, does not prevail against a severable provision of a Provincial Legislature restricting the power of corporations generally to acquire and hold land in the Province. Accordingly, the Mortmain and Charitable Uses Act (R. S. Ont., 1914, c. 103) is valid; but the provisions of R. S. Man., 1913, c. 35, and R. S. Sask., 1915, c. 14, as to the holding of land by Dominion companies, are invalid, since the provisions are not severable from the invalid provisions referred to above.

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John Deere Plow Co. v. Wharton [1915] A. C. 330 discussed and applied.

Judgments of the Supreme Court of Canada and of the Supreme Court of Ontario (Appellate Division) reversed.

* *Present:* VISCOUNT HALDANE, VISCOUNT CAVE, LORD SUMNER, and LORD PARMOOR.

CONSOLIDATED APPEALS by special leave from two judgments of the Supreme Court of Canada (May 6, 1919) and a judgment of the Appellate Division of the Supreme Court of Ontario (December 26, 1917).

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The consolidated appeals related to the validity of certain Provincial enactments so far as they purported to apply to companies incorporated under the Companies Act of Canada (R.S. Can., 1906, c. 79). The provincial Acts in question were the Extra-Provincial Corporations Act (R.S. Ont., 1914, c. 179), the Companies Act (R.S. Man., 1913, c. 35), Pt. IV., the Companies Act (Stat. Sask., 1915, c. 14), and the Mortmain and Charitable Uses Act (R.S. Ont., 1914, c. 103). Each of the first three named Acts purported in effect to preclude Dominion companies from carrying on business in the Province unless registered or licensed thereunder, and to impose penalties upon companies so doing. The last-named Act prohibited all corporations from holding real estate in Ontario unless authorized by licence or statute. The Manitoba and Saskatchewan Acts above referred to, requiring Dominion companies to be licensed thereunder, purported to make the obtaining of a licence a condition also for the holding of real estate in the Province. The sections of the Acts in question and their provisions appear more particularly from the judgment of their Lordships, as also does the manner in which their validity came in question in the six cases giving rise to the present appeals.

The Supreme Court of Canada, affirming the judgment of the Supreme Court of Saskatchewan en banc (which by an equal division of opinion affirmed the judgment of the Chief Justice), and affirming by a majority a majority judgment of the Court of Appeal of Manitoba, held that the provisions above referred to of the Acts of Saskatchewan and Manitoba were *intra vires*. The appeals to the Supreme Court of Canada are reported at 59 Can. S. C. R., pp. 19 and 35. 1921 2 A.C.
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In the cases relating to the Ontario legislation there was no appeal to the Supreme Court of Canada. The Appellate Division of the Supreme Court of Ontario held that the provisions in question were *intra vires* save so far as they precluded an unregistered Dominion company from suing in the Province; that decision reversed the judgment of

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Masten J. with regard to the provisions of the Extra-Provincial Corporations Act requiring a Dominion company to be licensed before carrying on its business in the Province, and affirmed his judgment with regard to the provisions of the Mortmain and Charitable Uses Act as to the holding of real estate in the Province. The appeal to the Appellate Division is reported at 41 Ont. L. R. 475.

The effect of the judgment of the various learned judges in Canada before whom the cases were argued is more fully stated in the judgment of the Judicial Committee.

1920. Nov. 30; Dec. 2, 3, 6, 7. *F. W. Wegenast* and *T. Moss* for the appellants; *Sir John Simon K.C.* and *Cyril Asquith* for the Attorney-General for Canada, intervenor. Each of the appellant companies was incorporated under s. 5 of the Companies Act of Canada (R.S. Can., 1906, c. 79) for trading purposes as shown by their letters patent. Under ss. 5 and 29 of that Act and s. 30 of the Interpretation Act (R.S. Can., 1906, c. 1) they had the fullest corporate powers, including power to hold land for the purpose of their undertakings. The provincial legislation now in question is invalid, since, as held in *John Deere Plow Co. v. Wharton* (1), the status and powers of a Dominion company as such cannot be destroyed by Provincial legislation; the provisions of the Provincial Acts are not distinguishable from those of the Act of British Columbia held invalid in that appeal. The legislation cannot be justified under s. 92, head 2, of the British North America Act, 1867, as direct taxation for Provincial purposes. The decision in *Bank of Toronto v. Lambe* (2) does not apply. Neither its "pith and substance" (see *Union Colliery Co. v. Bryden* (3)), nor its "true nature and character" (see *Russell v. The Queen* (4)) was Provincial taxation. Its "pith and substance" was that it controlled the exercise of trading and commercial rights which the Dominion had conferred upon Dominion companies. The Acts were, as their titles describe them, Companies Acts. It is a well-established principle that where Dominion legislation rests on one of the heads enumerated in s. 91 it overbears Provincial legislation in the same field, although it is of the kind mentioned in a head of s. 92. The legislative power of the Provinces in the

(1) [1915] A.C. 330, 341.

(2) (1887) 12 App. Cas. 575.

(3) [1899] A.C. 580, 587.

(4) (1882) 7 App. Cas. 829, 839, 840.

matter was limited to passing Acts which were genuinely regulative in character, and which applied equally to all persons, individual or corporate: *A.-G. for Ontario v. A.-G. for Canada* (1); *Toronto (City of) v. Virgo* (2); *John Deere Plow Co. v. Wharton* (3); *A.-G. for Canada v. A.-G. for Alberta* (4). The Dominion by incorporating a company not only creates a juridical person, it also confers rights and powers. Provincial legislation cannot validly require registration or the taking out of a licence as a condition to those rights and powers being operative.

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Nesbitt K.C. and *G. Lawrence* for the respondent and intervener the Attorney-General for Ontario and Attorney General for Manitoba. The Provincial legislation in question was *intra vires*. The effect of the incorporation was to give the appellants the right to trade in every Province, but subject to valid Provincial legislation. The Dominion had no power, and has not purported, to give the appellant companies the right to trade in violation of valid Provincial legislation. Licensing for the purpose of registration or taxation is *intra vires* of a Province; the Dominion could not empower its creature to trade unlicensed, and the Provincial legislation is, therefore, not a violation of any Dominion power. The legislation now in question can be described as either (a) licensing for the purpose of registration and information, or (b) for taxation and statistical purposes. The legislation condemned in *John Deere Plow Co. v. Wharton* (3) is distinguishable; the defect there was that the Registrar had a discretion to grant or withhold a licence, and had refused a licence unless the name of the company were altered. The licence here required was not discretionary, but was in the nature of a receipt indicating that the company had complied with all legislative requirements. The requirement of a licence was valid under s. 92, head 9, and the penalties were validly imposed as a method of enforcing that requirement. The legislation is valid under the principles laid down in *Citizens Insurance Co. v. Parsons* (5); *Colonial Building Association v. A.-G. for Quebec* (6); *Bank of Toronto v. Lambe* (7); *Brewers and Maltsters Case* (8); *Canadian Pacific Ry. Co. v. Notre Dame*

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(1) [1896] A.C. 348, 363.

(2) [1896] A.C. 88.

(3) [1915] A.C. 330.

(4) [1916] 1 A.C. 588, 597.

(5) (1881) 7 App. Cas. 96, 104,
106, 117.

(6) (1883) 9 App. Cas. 157, 166.

(7) 12 App. Cas. 575, 585, 586.

(8) [1897] A.C. 231.

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de Bonsecours (1); *A.-G. for Ontario v. A.-G. for Canada* (2); *A.-G. of Manitoba v. Manitoba Licence Holders' Association*. (3) It was held in *John Deere Plow Co.'s Case* (4) that a Provincial Legislature could regulate the conditions upon which the status and powers conferred by the Dominion by incorporation could be exercised in the Province and could require registration. The powers of the Dominion under the head "trade and commerce" should not be extended; the authorities show that the powers under that head are limited, and that the doctrine as to the "pith and substance" of the legislation is one which cannot safely be applied: *A.-G. for Canada v. A.-G. for Alberta* (5); *Cunningham v. Tomey Homma*. (6)

1921 2 A.C. p. 96. *Henn-Collins*, for the respondent the Attorney-General for Saskatchewan, adopted the above arguments and further distinguished the provisions of the Saskatchewan Act from those of the other Acts in question. The Act should be construed so as to be valid.

C. Bovill Clark for the respondent shareholders.

Wegenast replied.

1921. Feb. 25. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. In this case their Lordships are called on to interpret and apply the implications of a judgment, delivered by the Judicial Committee on November 2, 1914, in *John Deere Plow Co. v. Wharton*. (7) It was then laid down that the British North America Act of 1867 had so enabled the Parliament of the Dominion to prescribe the extent of the powers of companies incorporated under Dominion law with objects which extended to the Dominion generally, that the status and powers so far as there in question of one of the three appellant companies could not as matter of principle be validly interfered with by the Provincial Legislature of British Columbia. It was held that laws which had been passed by the Legislature of that Province, and which sought to compel a Dominion company to obtain a certain kind of Provincial licence or to be registered in the way brought before the Judicial Committee, as a

(1) [1899] A.C. 367, 372.

(2) [1896] A.C. 348, 360.

(3) [1902] A.C. 73, 79.

(4) [1915] A.C. 330, 341.

(6) [1916] 1 A.C. 588, 595, 596.

(5) [1903] A.C. 151.

(7) [1915] A.C. 330.

condition of exercising its powers in the Province or of suing in its Courts, were ultra vires. The reason given was that their Lordships interpreted what had been done by the Province in that case as interfering in a manner not consistent with the principles laid down with the status and corporate capacity of a company with Dominion objects to which the Parliament of Canada had given powers to carry on its business in every part of the Dominion.

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In the consolidated appeals now before their Lordships analogous questions are raised by legislation in varying forms enacted in three other Provinces, Saskatchewan, Manitoba, and Ontario.

Since the decision in 1914 the Province of Saskatchewan has passed an Act, in 1915, which supersedes its earlier Companies Acts, and apparently seeks to avoid the features in these which might conflict with the decision of this Committee in *John Deere Plow Co. v. Wharton* (1) as to the British Columbia legislation. The question raised as regards Manitoba arises out of older legislation of 1913 (subsequently amended and re-enacted in 1916), and as regards Ontario under an older Ontario Companies Act and the Extra-Provincial Corporations Act of 1914. No question is raised from British Columbia, or from any Provinces other than Saskatchewan, Manitoba and Ontario, on this occasion.

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The proceedings out of which the present appeals arise concern several Dominion companies, and are, as to Saskatchewan, two cases before a magistrate for infraction of the provisions of the Provincial Companies Act, and an action by a shareholder in one of the Dominion companies concerned, to restrain it from attempting to carry on its business without complying with the requirements of the Companies Act of the Province. The main issue in all these proceedings is substantially the same. In Manitoba an analogous question was raised in a shareholder's action, and also in an action by the Attorney-General of the Province. The main issue in Ontario was similar to that in Saskatchewan, but there was also raised a question as to whether a Dominion company could hold land in the Province without being authorized to do so by its Government, in accordance with Ontario statute law. In the proceedings referred to judgments were delivered in the Courts of first

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instance and by the Appellate Courts in Saskatchewan and Manitoba, and by the Courts of first instance and the Appellate Court in Ontario. In the cases in the two former Provinces there was an appeal to the Supreme Court of Canada, but in the Ontario litigation the appeal has been brought directly to the King in Council from the judgment of the Appellate Court of the Province. On August 18, 1919, special leave to appeal to the Privy Council was granted, and it was ordered that the appeals, six in number, from judgments which had been adverse to the Dominion companies concerned, should be consolidated and heard together. The Attorneys-General for Canada and for the Provinces have intervened throughout.

It will be convenient, having regard to the course taken in the argument, to consider in the first place the appeal from the Court of Appeal in Ontario.

In order to ascertain the real points now in controversy, it is important to refer in some detail to what was actually decided in 1914 in *John Deere Plow Co. v. Wharton*. (1) The British Columbia Companies Act had provided that, in the case of an incorporated company which was not one incorporated under the laws of the Province, and was called in the Act an extra-provincial company, certain conditions must be complied with. If such a company had gain for its object it must be licensed or registered under the law of the Province, and no agent was to carry on its business until this had been done. If this condition were complied with, such an extra-provincial company might sue in the Courts of the Province and hold land there. Such a company might also, if it were one duly incorporated under the laws of, among other authorities, the Dominion, and if authorized by its charter to carry out purposes to which the legislative authority of the Province extended, obtain from the Registrar, under the general Companies Act of the Province, a licence to carry on business within the Province on complying with the provisions of the Act and paying a proper licence fee. It was then to have the same powers and privileges in the Province as though incorporated under the Provincial Act. If such a company carried on business without a licence it was made liable to penalties, and its agents were similarly made liable. So long as unlicensed,

(1) [1915] A.C. 330.

the company could not sue in the Courts of the Province in respect of contracts in connection with its business made within the Province. The Registrar might refuse a licence where the name of the company was identical with or resembled that by which a company, society or firm in existence was carrying on business or had been incorporated, licensed or registered, or where the Registrar was of opinion that the name was calculated to deceive, or disapproved of it for any other reason.

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Their Lordships pointed out that, under the Dominion Companies Act, which they held to have been validly passed, the charter of the John Deere Plow Company incorporated it with the powers to which the legislative authority of the Parliament of Canada extended. The Dominion Interpretation Act provided that the meaning of such an incorporation included this, that the corporate body created should have power to sue, to contract in its corporate name, and to acquire and hold personal property for its purposes. There was in the Dominion Companies Act a provision that such a company should not be incorporated with a name likely to be confounded with the name of any other known company, incorporated or unincorporated, and it gave the Secretary of State the discretion in this connection. On incorporation the company was to be vested with all the powers, privileges, and immunities, requisite or incidental to the carrying on of its undertaking. It was to have an office in the city or town in which its chief place of business in Canada was situated, which should be its legal domicil in Canada, and could establish other offices and agencies elsewhere. No person acting as its agent was to be subjected, if acting within his authority, to individual penalty.

Their Lordships made reference to the circumstance that the concluding words of s. 91 of the British North America Act, "Any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces," render it necessary to do more than ascertain whether the subject-matter in question apparently falls within any of the heads of s. 92; for if it also falls within any of the enumerated heads of s. 91, then it cannot be treated

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as covered by any of those in s. 92. As is now well settled the words quoted apply, not only to the merely local or private matters in the Province referred to in head 16 of s. 92, but to the whole of the sixteen heads in that section: *A.-G. for Ontario v. A.-G. for Canada*. (1) The effect, as was pointed out in the decision just cited, is to effect a derogation from what might otherwise have been literally the authority of the Provincial Legislatures, to the extent of enabling the Parliament of Canada to deal with matters local and private where, though only where, such legislation is necessarily incidental to the exercise of the enumerated powers conferred on it by s. 91.

If therefore in legislating for the incorporation of companies under Dominion law and in validly endowing them with powers, the Dominion Parliament has by necessary implication given these companies a status which enables them to exercise these powers in the Provinces, they cannot be interfered with by any Provincial law in such a fashion as to derogate from their status and their consequent capacities, or, as the result of this restriction, to prevent them from exercising the powers conferred on them by Dominion law. Their Lordships, however, observed that when a company has been incorporated by the Dominion Government with powers to trade in any Province it may not the less, consistently with the general scheme, be subject to Provincial laws of general application, such as laws imposing taxes, or relating to mortmain, or even requiring licences for certain purposes, or as to the forms of contracts; but they were careful not to say that the sanctions by which such Provincial laws might be enforced could validly be so directed by the Provincial Legislatures as indirectly to sterilize or even to effect, if the local laws were not obeyed, the destruction of the capacities and powers which the Dominion had validly conferred. To have said so would have been to misread the scheme of the British North America Act, which is one that establishes interlacing and independent legislative authorities. Within the spheres allotted to them by the Act the Dominion and the Provinces are rendered on general principle co-ordinate Governments. As a consequence, where one has legislative power the other has not, speaking broadly, the capacity to pass laws which

(1) [1896] A.C. 348.

will interfere with its exercise. What cannot be done directly cannot be done indirectly. This is a principal which has to be kept closely in view in testing the validity of the Provincial legislation under consideration as affecting Dominion companies.

Their Lordships will not repeat what was laid down in the judgment delivered in the *John Deere Plow Case* (1) as to the other aspects of the general question there under consideration, but will proceed, in the light of what has just been said, to the consideration of the validity of the Ontario legislation under review.

The general Companies Act of Ontario was passed before the decision on the *John Deere Plow Case* (1), and has no special bearing on the question in this appeal. The important statute is the Extra-Provincial Corporations Act, which was also passed before that decision. The purpose of the latter statute is to provide that certain classes of extra-Provincial corporations (which mean corporations created otherwise than by or under the authority of an Act of the Ontario Legislature), including those created under any Act of the Dominion and authorized to carry on business in Ontario, must take out a licence (s. 4) under the Ontario statute. On complying with its provisions a corporation coming within these classes is entitled to receive a licence (s. 5) to carry on its business and exercise its powers within Ontario. In the absence of such a licence it is forbidden to do so (s. 7), and its agents are subjected to a like prohibition. A penalty of \$20 a day is imposed for any contravention of this provision. An extra-Provincial corporation coming within the classes referred to may apply to the Lieutenant-Governor in Council for a licence to carry on its business and exercise its powers in Ontario, and no limitations or conditions are to be included in any such licence which would interfere with the rights of such a corporation—for example, a Dominion company—to carry on in Ontario all such parts of its powers as by its Act or charter of incorporation it may be authorized to carry on and exercise there (s. 9, sub-ss. 1 and 2). A corporation receiving a licence may, subject to the limitations and conditions of the licence, and the provisions of its own constitution, hold and dispose of real estate in Ontario, 1921 2 A.C. p. 102.

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just as an Ontario company might (s. 12). A corporation receiving a licence may be called on to make returns comprising such information as is required from an Ontario company (s. 14). The Lieutenant-Governor in Council may make regulations for, among other things, the appointment and continuance by the extra-Provincial company of a representative in Ontario on whom service of process and notices may be made (s. 10, sub-s. 1 (b)). If such a company, having received a licence, makes default in complying with the limitations and conditions of the licence or of the provisions as to returns, or of the regulations respecting the appointment of a representative, its licence may be revoked (s. 15). If such a corporation carries on in Ontario without a licence any part of its business, it is to incur a penalty of \$50 a day, and is rendered incapable of suing in the Ontario Courts in respect of any contract made in whole or in part within Ontario in relation to business for which it ought to have been licensed (s. 16). The Lieutenant-Governor in Council may prescribe fees on the transmission of the statement or return required under s. 14. Such fees are to vary with the capital stock of the company (s. 20).

It is obvious that the Act thus summarized assumes that the Legislature of the Province can impose on a Dominion company conditions which, if not complied with, will restrict the exercise of its powers within the Province. These conditions do not appear to their Lordships to be merely a means for the attainment of some exclusively Provincial object, such as direct taxation for Provincial purposes. They apparently assume a general right to limit the exercise of the powers of extra-Provincial companies if they seek to exercise these powers within Ontario. A question of principle is thus raised broadly, and their Lordships now turn to the judgments in the Courts of Ontario in which it has been dealt with. In these Courts over this question there has been divergence of judicial opinion, and the question itself has been considered there with such thoroughness and ability that it is proper to refer to the diverging reasoning in some detail.

Masten J., before whom the cases came in the first instance, was of opinion that in passing the Extra-Provincial Corporations Act the Legislature of Ontario had exceeded its powers. He pointed out that the Dominion Companies

Act had vested in the companies incorporated under its provisions all the powers, privileges and immunities requisite or incidental to the carrying on of its undertaking, and that, in view of the decision in the *John Deere Plow Case* (1), the power conferred on the Parliament of Canada to regulate trade and commerce, and to that extent to prescribe these capacities in cases affecting the Dominion at large, must be taken to be paramount and overriding. He thought that s. 7 of the Extra-Provincial Corporations Act afforded the keynote and the "pith and substance" of that Act, the purpose of which, as applied to Dominion companies, was to preclude them from the exercise of some of their powers and to deprive them of their status in Ontario unless a licence were obtained and certain fees paid there. However simple and little oppressive such a process might be, it constituted none the less a direct interference. It had been attempted to support this interference as justified by the powers conferred by s. 92 on the Provinces to raise revenue by direct taxation, to deal with property and civil rights, particularly from the point of view of mortmain, to legislate for the administration of justice, and to impose penalties in furtherance of these ends. But in the opinion of the learned judge these aspects of what had been included in the Provincial statute, except in the case of the mortmain law, had been introduced into it in reality only as ancillary to s. 7, and to the main purpose of asserting a direct control over the Dominion companies before permitting them to carry on their business in the Province. This purpose so permeated the whole Act that it was not practicable to hold certain of its sections valid and others invalid. The provision of s. 9, sub-s. 2, which excluded from any licence to be required limitations or conditions restricting the rights of the company to carry on in Ontario all such parts of its business and powers as by its Act or Charter of Incorporation it might be authorized to exercise there, did not mend matters. But the provisions of the Ontario Mortmain Act stood on a different footing. For the incapacity to hold lands did not arise because of the application of the Extra-Provincial Corporations Act, but because of the general scope of the Mortmain Act itself, a separate statute which the learned judge seemingly regarded as within the powers of the Province.

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In the Supreme Court of Ontario, which heard the appeal from this decision, and from which an appeal has been brought directly to the Sovereign in Council, opinion was divided. The case was argued before five judges, the Chief Justice of Ontario, MacLaren J.A., Magee J.A., Hodgins J.A., and Ferguson J.A. By a majority of four to one, Ferguson J.A. dissenting, the judgment of Masten J. was reversed. It was declared that the Extra-Provincial Corporations Act was *intra vires*, excepting as to the words of s. 16, sub-s. 1, to the effect that the Dominion companies could not sue unless they had obtained Provincial licences. In agreement with Masten J. the Appellate Division held that the companies were bound to comply with the provisions of the Ontario Mortmain Act as a condition of occupying and holding lands in the Province.

Meredith C.J. made an able and exhaustive scrutiny of the legislation. He observed that it was well settled that, notwithstanding the Dominion having conferred on a company of its creation rights and powers, that company was subject to and bound to obey the laws of the Province with regard to taxation for Provincial purposes; with regard also to contracts made within the Province, and as to the holding and tenure of land; and that the exercise by the Province of its authority to pass such laws necessarily limits or restricts the power granted to the company by the Dominion. He then summarized the judgment of this Committee in *John Deere Plow Co. v. Wharton* (1), and stated one of its results as having been that as the provisions of the British Columbia statute there in question sought to compel the John Deere Plow Company to obtain a licence or to be registered in that Province, as a condition of exercising its power of suing in the Court of the Province, these provisions were *ultra vires*. The learned Chief Justice went on to interpret the reasons assigned by this Committee for their judgment. (1.) Notwithstanding the generality of the expression in s. 92 of the British North America Act, the words "civil rights" must be regarded as not covering cases expressly dealt with in s. 91 or even in s. 92 itself. (2.) Notwithstanding that a company has been incorporated by the Dominion with power to trade, it is not the less subject to Provincial laws of general application

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enacted under s. 92, including laws as to mortmain and payment of taxes, even though in the latter case the form assumed is that of requiring a licence to trade affecting Dominion companies in common with other companies, and including laws as to contracts. (3.) It might be competent for a Provincial Legislature to pass laws relating to companies without distinction, requiring those not incorporated within the Province to register for limited purposes, such as the furnishing of information or, under a general statute as to procedure, the giving security for costs. Meredith C.J. thought that the key to the decision was that the Judicial Committee were of opinion that the provisions of the British Columbia Act were not of these characters, but were directed to interfering with the status of Dominion companies and to preventing them from exercising the powers conferred on them by the Parliament of Canada. He referred to various earlier decisions of this Committee, and came to the conclusion that what was intended in the *John Deere Plow Co. v. Wharton* (1) was to lay down that it was not competent for a Provincial Legislature to single out Dominion corporations and to subject them to laws which were not applicable to all corporations. An important circumstance in that case was, he thought, that the Registrar had asserted power to refuse a licence unless the name were changed, an interference with the status of the company. As to this circumstance, he drew attention to what he regarded as an important difference between the British Columbia and the Ontario legislation. In the latter s. 9, sub-s. 2, precluded the insertion in the licence of any limitation or condition which would limit the rights of a corporation to carry on in Ontario such parts of the business and powers as by its Act or charter of incorporation had been authorized. The Chief Justice notices in passing that, by s. 15 of the Extra-Provincial Corporations Act, if a corporation receiving a licence makes default in observing or complying with its conditions or the provisions of s. 14 as to returns, or any regulations respecting the appointment of a representative in the Province, the licence may be revoked. He thinks that since the amendment made in the original form of the Act which is embodied in s. 9, sub-s. 2, just referred to, the words have now no meaning, and would have been eliminated but for the oversight of the

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draftsman. In his dissenting judgment, however, Ferguson J.A. takes the view that, even if the new section was meant to restrict the purpose of the Act, the words of s. 9, sub-s. 2, do not do so sufficiently to alter that purpose as remaining.

The Chief Justice was of opinion that the last part of s. 16, which precludes an extra-Provincial company which is unregistered from taking legal proceedings in Ontario in respect of a contract made in whole or in part in the Province, was ultra vires; in this the other members of the Court appear to have agreed with him. Subject to this exception he thought that the provisions of the enactment in question were of the character of "Provincial laws of general application," within the meaning of the decision in *John Deere Plow Co. v. Wharton*. (1) What was important was not the form, which need not be uniform. In substance, what was done was to impose a tax which was really lighter than that imposed on provincial companies. The other provisions of the Act were ancillary to this taxation, and it was no valid objection to what was done that, to the extent required for the exercise of powers specifically entrusted to the Provincial Legislatures, it, in a sense, restricted the exercise of powers conferred by Dominion authority. All laws imposing the necessity of obtaining licences and paying taxes, and of conforming to mortmain requirements, must do so. In the opinion of the Chief Justice the Act was not, in pith and substance, one designed to restrict Dominion companies "in the exercise of the powers conferred on them by the Dominion authority, but an Act lawfully passed for purposes as to which the Legislature by which it was enacted had authority to legislate." As to the Mortmain Act, he agreed with Masten J., that the law was one of general application and was binding on all companies which it purported to include. MacLaren, J.A., Magee, J.A., and Hodgins J.A. agreed in substance with the above conclusions.

Ferguson J.A. in effect agreed with the reasoning of Masten J. He was of opinion that the Act as originally enacted was passed on the assumption that it was within the legislative authority of the Province to control all extra-Provincial corporations, and that, notwithstanding that in its existing form amendments had been incorporated

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into the Act designed to mitigate this, the Act still embodied the object of general control. This was shown by the power given by s. 11 and by the regulations, which purported to enable the Lieutenant-Governor in Council to refuse a licence if the name of the company was objectionable in any of various respects.

Their Lordships defer making any observations on these judgments until they have dealt with the other cases. They only observe that with certain of the general propositions expressed by Meredith C. J. in his judgment they are in substantial agreement.

Their Lordships turn next to the case which has been brought forward as regards the legislation on the subject in Manitoba. In the Courts of that Province analogous questions were raised in a shareholder's action. The Attorney-General of the Province intervened in the course of the subsequent appeal.

In Manitoba there was passed in 1913 a general Companies Act, of which Part IV. deals with extra-Provincial companies and includes Dominion corporations. Under s. 108 every such corporation is required to take out a licence under this part of the Act, and by s. 109 (inter alia) such a corporation, on complying with the provisions of that part and with the regulations made under the Act, is entitled to receive a licence to carry on its business and exercise its powers in Manitoba. By s. 111 (inter alia) such a corporation may apply to the Lieutenant-Governor in Council "for a licence to carry on its business or part thereof, and exercise its powers or part thereof, in Manitoba, and upon the granting of such licence such corporation may thereafter, while such licence is in force, carry on in Manitoba the whole or such parts of its business and exercise in Manitoba the whole or such parts of its powers as may be embraced in the licence; subject, however, to the provisions of this part and to such limitations and conditions as may be specified in the licence." On such an application the corporation is to file certain evidence and a power of attorney to someone in the Province appointing him to accept service. This is not to apply if the head office is within the Province (s. 114, sub-s. 3). By s. 118 no such corporation is to carry on within Manitoba any of its business, and no agent is to act for it, until a licence has been

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granted to it, and then only so long as this is in force. Sect. 120 requires annual returns of information to be made. By s. 121 the Lieutenant-Governor in Council may suspend or revoke the licence for default in observing the provisions of the Act. Sect. 122 provides, as in the case of the Ontario statute, for penalties for the carrying on of business in the absence of the licence, and incapacitates the corporation from suing without it in the Courts of the Province. Sect. 126 enables the Lieutenant-Governor to fix the fees to be paid. These are for the exchequer of the Province, and are to vary in part according to the nature and importance of the business to be carried on in the Province, and in part according to the amount of the entire capital stock of the corporation. In addition to these provisions, s. 112 enables a duly licensed corporation to hold real estate in the Province, but limited, in its licence, by s. 113 to such annual value as may have been deemed proper, as fully as if it had been a Manitoba company under the general Act. There is no Mortmain Act in the Province, but the registration of titles to land requires a licence and the registration of title to real estate in the case of extra-Provincial companies.

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p. 109. Thus there does not appear to be anything in the form or substance of the Manitoba Act which differentiates it materially from the corresponding Ontario Act.

The Manitoba case was heard in the Courts of the Province in the same year, 1917, as the Ontario case, but a little earlier. Macdonald J., the judge of first instance, decided in favour of the validity of the legislation, but apparently without giving reasons. On appeal the Court of Appeal of the Province was evenly divided, with the result that the appeal was dismissed. Howell C. J. and Cameron J. A. were for affirming, while Perdue J. A. and Haggart J. A. were for reversing.

Howell C. J. began his judgment by pointing out that the Province derives part of its revenue from charges for the incorporation of companies and for licences, and that all companies doing business in Manitoba, no matter where incorporated, have to pay what is sometimes called a tax and at others a fee for a licence. He thought that the Manitoba statute should be taken to have been enacted "for the purpose of completing the Provincial scheme of

direct taxation for the general purposes of the Province by a general charge or tax on all corporations, as in *Bank of Toronto v. Lambe*. (1)" The decision in that case also disposed, in the view of the learned Chief Justice, of the argument that the discretionary power of prescribing conditions and limitations constituted an objection to the validity of the scheme of the Act, for there was no power to refuse a licence generally, like that in the British Columbia statute.

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Cameron J. A. also dwelt on this distinction, and on the more restricted scope of the Manitoba Act in other points. As to the imposition of penalties, that carried the matter no further, for the true test was whether the substantive provision was authorized by s. 92. He arrived at the conclusion that the Companies Act was one the legislation in which was of such a general character as was saved by the decision in *John Deere Plow Co. v. Wharton* (2), being in reality wholly directed to subjects entrusted to the Provincial Legislatures by s. 92 of the British North America Act.

Perdue J. A. dissented. Sect. 111, enabling the Lieu-tenant-Governor in Council to insert in the licence limitations and conditions as to the exercise of the company's powers within the Province, showed that there was really no difference in this respect between the Manitoba Act and that declared ultra vires in *John Deere Plow Co. v. Wharton*. (2) He thought that for the purposes of the question there decided the provisions of the two Acts were indistinguishable. The object of such statutes was, in his view, to restrain Dominion companies from exercising within the Province the rights conferred on them by their charters, unless licensed. The decisions of the Privy Council in *Bank of Toronto v. Lambe* (1) and *the Brewers and Malsters' Association v. Attorney-General for Ontario* (3), were not really in point, for they only established that what had to be paid was in these cases in the nature of direct taxation. Here the Provincial Legislature had gone further and had failed to confine their legislation within the limits which were settled by the *John Deere Plow Case* (2) to be those of what was legitimate. Haggart J. A. concurred in this conclusion.

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(1) 12 App. Cas. 575.

(2) [1915] A.C. 330.

(3) [1897] A.C. 231.

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There was in this case, unlike that of Ontario, an appeal to the Supreme Court of Canada, which also heard an appeal from the Supreme Court of Saskatchewan. The judgments of the Supreme Court of Canada, dismissing both appeals, were given on the same date, Idington J., Anglin J., and Brodeur J. taking one view, and the Chief Justice and Mignault J. dissenting. It will be convenient to reserve consideration of these judgments until reference has been made to the Saskatchewan cases, which were disposed of along with those from Manitoba.

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The four Saskatchewan Companies Acts, now operative, differ from those of Ontario and Manitoba in the circumstance that they were passed in 1915, 1916 and 1917, after the decision in *John Deere Plow Co. v. Wharton* (1) by this Committee. It is the first of these four Acts that alone is important for the purposes of the present question. This is a general Companies Act, the provisions in which have nothing unusual in them, but which extends to (inter alia) Dominion companies having gain for their object, and carrying on business in the Province. The effect of s. 23 is that a Dominion company of this nature must be registered under the Act, and that if it does not register, the Dominion company and its representatives are liable to penalties for carrying on business in the Province. The effect of s. 24 is that registration cannot be refused to a Dominion company. By s. 25 the company may, on complying with the provisions of the Act, receive an annual licence, for which it is to pay fees to the Government of the Province, and may then carry on its business, subject to the provisions of the instrument creating it, as if it had been incorporated under the Act; but a company carrying on business without a licence is liable to penalties. By s. 27 the Lieutenant-Governor in Council may prescribe such regulations as he may deem expedient for the registration of all companies, and for fixing the fees payable. By s. 29 if the Registrar thinks that a company registered has ceased to carry on business he may, after finding on inquiry that this is so, strike the company off the register, whereupon it is dissolved; but by an amending Act passed since the commencement of these proceedings the provision as to dissolution is to take effect only as to Saskatchewan

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companies. By s. 30 if the prescribed fee is not paid the company may be struck off the register.

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Proceedings were taken in Saskatchewan before a Justice of the Peace against a Dominion company for not being licensed or registered, and an action was brought by a shareholder, as in the cases of the other Provinces already referred to. The substantial question was again the validity of the Provincial statute, and this statute Elwood J., the judge of first instance, held to have been validly enacted. On appeal the Supreme Court of Saskatchewan, en banc, consisting of Haultain C.J., Newlands J., Lamont J., Brown J. and McKay J. dismissed the appeal unanimously. On appeal to the Supreme Court of Canada that Court also unanimously dismissed the appeal. Elwood J. thought that the fees imposed were direct taxation, and that there was no prohibition of carrying on business without licence or registration, but merely a penalty, which did not interfere with the status of the company.

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The judgment of the Supreme Court of Saskatchewan was delivered by Newlands J. He pointed out that the form of the existing Act, which was passed in 1915, after the decision of the Judicial Committee in the *John Deere Plow Case* (1), made it evident that the legislature of the Province had endeavoured to get rid of what might have been held to be objectionable in older legislation. For example, the old provision had been dropped, according to which any company required to be registered should not, while unregistered, be capable of suing in the Courts of the Province. It was true that there was still a provision that every company carrying on business in the Province without a licence was to be guilty of an offence and liable to a penalty; but this did not necessarily render its contracts void. The prohibition of a particular act under a penalty was altogether different from requiring a general regulation to be complied with under a penalty. It was not really the intention of the legislature to prevent the company from doing business, but only to designate what companies were to be registered and pay licence fees. The status and powers of the Dominion company were therefore not affected.

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In the Supreme Court of Canada the decisions in the Saskatchewan and Manitoba cases were reviewed and affirmed. There was no appeal brought there from the Ontario judgment, but the decision of the Ontario Appellate Division had been given more than a year previously and the reasons for it were alluded to in the Supreme Court of Canada in the other cases. It will be convenient to consider together the judgments in the other two cases, which were delivered on the same day.

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In the Manitoba appeal the Chief Justice of Canada dissented and would have reversed. For he took the same view as *Perdue J. A.* had expressed in the Court below. He thought that the Manitoba Act, if valid, would deprive the Dominion companies of their status and powers, notwithstanding that the provision in s. 18 of the British Columbia Act prohibiting the registration of an extra-Provincial corporation with a name of which the Registrar disapproved did not occur in the Manitoba Act. But while he formed this opinion about the Manitoba Act he thought otherwise about that of Saskatchewan, which he held had been so framed as to get over the difficulties indicated in the decision in the *John Deere Plow Case*. (1) His view was that in the latter Act the provisions were confined to the levying of direct taxation, and that its construction was such that if a Dominion company paid the tax it could carry on business without taking out a licence. But while arriving at this conclusion he stated that he had done so with difficulty and doubt, and that he considered the statute objectionable in form, though not in essence. *Anglin J.* expressed an opinion similar in doubt as to the Manitoba legislation, but on the whole he thought that the decision in the Manitoba case might be affirmed, though he arrived at that conclusion only after doubt. As to the Saskatchewan appeal he thought the provisions of the Act there distinguishable, and he concurred in the reasons given by his colleagues for the dismissal of the appeal. *Brodeur J.* laid much stress in the Manitoba case on the title of the Dominion company to have a licence as of right. The licence he considered to be a mere method of effecting direct taxation. He took the same view of the Saskatchewan legislation. The obligation of a Dominion company to take out a licence was under a law of general

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application, and was a mere means of taxation. He concurred in the dismissal of both appeals. Idington J. agreed. The cases seemed to him to turn on the same question, whether a Provincial Legislature could tax a Dominion company. He thought the earlier decisions of the Judicial Committee had established that it could do so in this kind of form. No one of the enumerated powers in s. 91 enabled the Dominion Parliament to entitle a Dominion company to escape from the obligations of a private citizen in the Province. Mignault J. agreed as regards the Saskatchewan appeal. The statute there was a pure taxing statute, and the Dominion companies were not prohibited from carrying on business in the Province, but were merely subjected to a penalty for not taking out a licence. In the Manitoba case he dissented from the majority, and thought that there should be a reversal. For the companies were by the statute there compelled to take out a licence as a condition of exercising their powers in the Province, and of invoking the jurisdiction of its Courts. He agreed with the view taken by Perdue J. A. in the Court below.

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Their Lordships have thus examined in some detail the course of the proceedings in the cases under consideration, and have stated the substance of the various judgments given. There has been much divergence of opinion in these judgments. It has arisen over the single question which is the crucial one in these appeals. Can the relevant provisions of all or any of the three sets of Provincial statutes be justified as directed exclusively to the attainment of an object of legislation assigned by s. 92 to the Legislatures, such as is the collection of direct taxes for Provincial purposes; or do these provisions interfere with such powers as are conferred on a Dominion company by the Parliament of Canada to carry on its business anywhere in the Dominion, and so affect its status? The question is one primarily of the interpretation of the British North America Act and in the second place of the meaning of the principle already laid down by this Committee in the *John Deere Plow Case*. (1) The constitution of Canada is so framed by the British North America Act that the difficulty was almost certain to arise. For the power of a Province to legislate for the incorporation of companies is limited to companies with

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Provincial objects, and there is no express power conferred to incorporate companies with powers to carry on business throughout the Dominion and in every Province. But such a power is covered by the general enabling words of s. 91, which, because of the gap, confer it exclusively on the Dominion. It must now be taken as established that s. 91 enables the Parliament of Canada to incorporate companies with such status and powers as to restrict the Provinces from interfering with the general right of such companies to carry on their business where they choose, and that the effect of the concluding words of s. 91 is to make the exercise of this capacity of the Dominion Parliament prevail in case of conflict over the exercise by the Provincial legislatures of their capacities under the enumerated heads of s. 92. It is clear that the mere power of direct taxation is saved to the Province, for that power is specifically given and is to be taken, so far as necessary, on a proper construction to be an exception from the general language of s. 91, as was explained by Sir Montague Smith in delivering the judgment of the Judicial Committee in *Citizens Insurance Co. v. Parsons*. (1) Nevertheless, the methods by which the direct taxation is to be enforced may be restricted to the bringing of an action, with the usual consequences, which was all that was decided to be legal in *Bank of Toronto v. Lambe*. (2) It does not follow that because the Government of the Province can tax it can put an end to the existence or even the powers of the company it taxes for non-compliance with the demands of the tax-gatherer. Their Lordships find themselves unable to agree with an observation made by Meredith C.J. towards the conclusion of his judgment. "It is," he says, "I think to be regretted that at the outset it was not determined that the authority of the Parliament of Canada to incorporate companies was limited to creating them and endowing them with capacity to exercise such powers as it might be deemed proper that they should possess, but leaving to each Province the power of determining how far, if at all, those powers should be exercised within its limits." Such a construction would have left an hiatus in the British North America Act, for there would have been in the Act so read no power to create a company with effective powers directed to other than merely Provincial objects. It was decided as long

(1) 7 App. Cas. 108.

(2) 12 App. Cas. 575.

ago as 1883, in *Colonial Building Investment Association v. A.-G. for Quebec* (1) that there was no such hiatus. Nor does it appear, if reference may be made as matter of historical curiosity to the resolutions on which the British North America Act was founded, and which were passed at Quebec on October 10, 1864, for the guidance of the Imperial Parliament in enacting the Constitution of 1867, that these resolutions gave countenance to the idea that a different construction on the point in question was desired. The learned Chief Justice refers to them without quoting their language. But, in connection with the topic in controversy, all that was desired by the words of these resolutions to be assigned to the Provincial Legislatures was "the incorporation of Private or Local Companies, except such as relate to matters assigned to the General Parliament."

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In *Tennant v. Union Bank of Canada* (2) it was decided that the British North America Act must be so construed that s. 91 conferred powers to legislate which might be fully exercised even though they modified civil rights in a Province, provided that these powers are clearly given. The rule of construction is that general language in the heads of s. 92 yields to particular expressions in s. 91, where the latter are unambiguous. The rule may also apply in favour of the Province in construing merely general words in the enumerated heads in s. 91. For, to take an example, notwithstanding the language used at the end of s. 91, the heading in that section, "Marriage and Divorce," was interpreted on an appeal to this Committee in the *Marriage Laws Case* (3) as being pro tanto restricted by the provision of s. 92 which entrusted the making of laws relating to the solemnization of marriage to the Provincial Legislatures. Whether an exception is to be read in either case depends on the application of the principle that language which is merely general is, as a rule, to be harmonized with expressions that are at once precise and particular by treating the latter as operating by way of exception. The two sections must be read together, and the whole of the scheme for distribution of legislative powers set forth in their language must be taken into account in determining what is merely general and what is

(1) 9 App. Cas. 157.

(3) [1912] A.C. 880.

(2) [1894] A.C. 31.

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particular in applying the rule of construction. For neither the Parliament of Canada nor the Provincial legislatures have authority under the Act to nullify, by implication any more than expressly, statutes which they could not enact. The decision in 1896 of *A.-G. for Ontario v. A.-G. for Canada* (1) is a good illustration of the fashion in which the rule of construction thus stated has been interpreted and applied.

It is obvious that the question of construction may sometimes prove difficult. The only principle that can be laid down for such cases is that legislation the validity of which has to be tested must be scrutinized in its entirety in order to determine its true character. *Madden v. Nelson, etc. Ry. Co.* (2), and *Canadian Pacific Ry. Co. v. Notre Dame de Bonsecours* (3), are excellent illustrations of how this has been done. In the first-mentioned case a Provincial Legislature, by a Cattle Protection Act, sought to make a Dominion railway company liable for injury to cattle straying on the line within the Province, unless they had erected proper fences. It was held that the Province had no power to impose liability on the Dominion railway companies as such for the provision of works. It was pointed out in the latter case that a very different point really arose—namely, that although any direction by a Provincial Legislature to a Dominion railway company to alter the construction of the drains on its works would be ultra vires, still the railway company were not exempted from the obligation of a Provincial law applicable to all land owners, without distinction, that they should clean out their ditches so as to prevent nuisance.

In cases such as those referred to the rule of construction above stated has been applied wherever possible. It is only where there is actual inconsistency that the effect of the concluding words of s. 91 can be invoked. *A.-G. of Manitoba v. Manitoba Licence Holders' Association* (4) is yet another useful illustration. The legislature of Manitoba had enacted the prohibition of transactions in liquor to take place wholly within the Province, with the saving of bona fide transactions between persons in the Province and those in other Provinces or in foreign countries. It was held that such legislation was valid as falling within

(1) [1896] A.C. 348.
(2) [1899] A.C. 626.

(3) [1899] A.C. 367.
(4) [1902] A.C. 73.

head 16 of s. 92, "matters of a merely local or private character in the Province," notwithstanding that its effect would be to interfere consequentially with sources of Dominion revenue and with business operations beyond the Province. *Union Colliery Co. v. Bryden* (1) and *Cunningham v. Tomey Homma* (2) also furnish illustrations of how the rule of construction under consideration has been applied.

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The only other decision to which their Lordships desire to make reference is that in *Brewers and Maltsters' Association v. A.-G. for Ontario*. (3) There the Dominion Legislature had previously and validly regulated the manufacture and wholesale vending of spirituous liquors, and provided for the issue of licences for such manufacture and sale. Ontario had subsequently passed an Act requiring every person so licensed by the Dominion also to obtain a licence for sale from the Province, and to pay a fee for it. It was held in the first place that this was direct taxation for provincial purposes, and therefore within the power of the Province, and secondly that the licence was such as to be authorized among the "other licences" included in the general words of head 9 of s. 92—"shop, saloon, tavern, auctioneer, and other licences in order to the raising of a revenue for Provincial purposes." Their Lordships think that what is implied in this decision is that while the Dominion Legislature had power to place restrictions throughout Canada on the traffic in liquor, the powers conferred by s. 91 did not in any way conflict with the positive powers of taxation and licensing for Provincial objects, expressly and particularly conferred by s. 92. These, in so far as there might have been any interference, had been conferred by the Imperial Parliament on the Provinces by way of exception both from the general power of legislation given to the Dominion by the initial words of s. 91, and from any purely general enumerated head, such as the regulation of trade and commerce.

The principle of interpretation to be followed in applying the test laid down in the *John Deere Plow Co. Case* (4), that Provincial legislation cannot validly destroy the status and powers conferred on a Dominion company by Act of the Parliament of Canada, does not appear to be obscure

(1) [1899] A.C. 580.
(2) [1903] A.C. 151.

(3) [1897] A.C. 231.
(4) [1915] A.C. 330.

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when read in this light. Turning to its application, the first thing to be observed is the nature of the questions to be answered. Their Lordships will dispose in the first place of a subsidiary matter, which is whether a Dominion company can be precluded from acquiring and holding land in a province by a Provincial law of the nature of a general Mortmain Act. It is clear, both on principle and from previous decisions, that it is within the competence of a Provincial Legislature to enact such legislation, and the question is therefore answered in the affirmative. If there be a provision to this effect, occurring even in a statute which in other respects is ultra vires, and that provision be severable, it is valid. In the Ontario case there is therefore no doubt that the broad result of the contention of the Province under this head is well founded; for there the Legislature has passed a Mortmain Act of general application, and in regard to this Act a Dominion company is in no better position than any other corporation which desires to hold land.

In Manitoba there is no general Mortmain Act, but s. 112 of the Manitoba Companies Act enables a corporation receiving a licence under Part IV. of the Act, relating to extra-Provincial companies, to acquire and hold land as freely as could any company under Part I. of the Act. Even if the provision as to the licensing of extra-Provincial companies is held to be ultra vires, so as to prevent such a provision from being operative, as being inseverable, it is plain that the substance of a provision which is of the character of a mortmain law is within the power of the Province.

In Saskatchewan there is no general Mortmain Act, but the Companies Act of 1915, by s. 19, enables a company incorporated under the law of the Province to hold land. By s. 25 a company not so incorporated (and this includes a Dominion company) may, if it has been licensed, carry on its business as if it had been incorporated under the law of the Province. This enables it to hold land unless the provisions as to the grant to it of a licence are inoperative. Their Lordships do not think that s. 29 of the Companies Act of Canada, which purports to enable a Dominion company to acquire and hold real estate requisite for the carrying on of its undertaking, can prevail against any servable provision by a Provincial Legislature restricting

the power of corporations generally to acquire or hold real estate in the Province.

Their Lordships now pass to the question of a more general order, which is the main one in these appeals. Had the Provinces of Ontario, Manitoba and Saskatchewan power to impose on Dominion companies the obligation to obtain a licence from the Provincial Government as a condition of the exercise in those Provinces respectively of the powers conferred on them by the Dominion?

If the condition of taking out a licence had been introduced, not so as to affect the status of the Dominion company, but simply for the purpose of obtaining payment of a direct tax for Provincial purposes, or of securing the observance of some restriction as to contracts to be observed by the public generally in the Province, or of causing the doing, by that public generally, of some act of a purely local character only under licence, their Lordships would, for reasons already given, have been prepared to regard the condition as one which it was within the power of the Province to impose. Even then it would have been requisite to see, as was pointed out by Lord Herschell, in delivering the judgment of the Judicial Committee in the *Brewers and Maltsters Case* (1), that the Provincial Legislature was not, under the guise of imposing such direct taxation in the form of which he was speaking as being within their power, really doing something else, such as imposing indirect taxation. As to any inquiry in the future whether this or anything analogous has been in substance attempted, their Lordships hold themselves unfettered. If, for example, such a question were to arise hereafter, involving consideration of whether the real effect of the licence required by a Provincial law has been to abrogate capacity which it was within the power of the Parliament of Canada to bestow, or whether for a breach of conditions a Provincial Legislature could impose, not an ordinary penalty but one extending to the destruction of the status of the company and its capacity in the Province, nothing that has been here said is intended to prejudice the decision of such a question, should it occur. It is sufficient to observe once more that in such matters what cannot be done directly can no more be effected by indirect methods.

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What remains is to apply the principle of the decision in the *John Deere Plow Case* (1) as so interpreted to the actual Provincial legislation challenged.

As to Ontario, the statute impugned is the Extra-Provincial Corporations Act in its application to Dominion companies. Their Lordships have come to the conclusion that the real effect of this Act, as expressed or implied by its provisions, is to preclude companies of this character from exercising the powers of carrying on business in Ontario, to the same extent as in other parts of Canada, unless they comply with a condition sought to be imposed, that of obtaining a licence to do so from the Government of the Province. By s. 7 such companies are expressly prohibited from doing so, and the provision in s. 9, sub-s. 2, that no limitations or conditions are to be included in such a licence as would limit a Dominion company, for example, from carrying on in the Province all such parts of its business, or from exercising there all such parts of its powers, as its Act or charter of incorporation authorizes, does not in their Lordships' opinion sufficiently mend matters. For the assertion remains of the right to impose the obtaining of a licence as a condition of doing anything at all in the Province. By s. 11 the grant of the licence is made dependent on compliance with such regulations as may happen to have been made by the Lieutenant-Governor in Council under ss. 2 and 10 of the Act. By s. 16, and also under s. 7 itself an extra-Provincial corporation required to take out a licence is to be fined for not doing so, and, under s. 16, is to be incapable of suing in the Courts of the Province. Their Lordships are of opinion that these provisions cannot be regarded as confined only to such limited purposes as would be legitimate, and that they are therefore ultra vires.

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Taking next the Companies Act of Manitoba, Part IV. of this Act deals with extra-Provincial corporations, including Dominion companies. The effect of the scheme of this part does not appear to their Lordships to differ in any feature that is material from that of the Ontario Act. Inter alia, a Dominion company must take out a licence, which it is entitled to receive if it complies with the provisions of the Act and with regulations to be made by the

(1) [1915] A.C. 330.

Lieutenant-Governor in Council. There may, under s. 111, be limitations and conditions specified in the licence, and if the company makes default in complying with these or certain other provisions, the licence may be revoked under s. 121. Unless the company obtains a licence it cannot, nor can any of its agents, carry on business in Manitoba. Penalties are imposed for carrying on business without a licence, and so long as unlicensed the company cannot invoke the jurisdiction of the Courts of the Province. It does not alter the scope of these provisions that by s. 126 fees are payable for the licence, to be applied to the benefit of the revenue of the Province.

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Their Lordships are unable to take the view that these sections regarded together are directed solely to the purposes specified in s. 92. They interpret them, like those of the Ontario statute, as designed to subject generally to conditions the activity within the Province of companies incorporated under the Act of the Parliament of Canada. The restriction in this statute as to the holding of land cannot be severed from the general provisions as to licensing so as to make those restrictions enforceable as being in the nature of Mortmain legislation.

The statute remaining to be considered is that passed by the Legislature of Saskatchewan in 1915, a general Companies Act which, however, contains provisions applicable to Dominion companies. By s. 23, if such companies carry on business in Saskatchewan, they must be registered under this Act, and if they carry on business without registering, the companies, and also the agents acting for them, are made liable on summary conviction to penalties. By s. 24 such companies are entitled to be registered on complying with the provisions of the Act and on paying the prescribed fees. There are also payable annual fees. By s. 25 such companies may upon certain conditions receive a licence to carry on business in Saskatchewan, and if they carry on business without a licence are guilty of an offence and liable to penalties. By s. 29, where the Registrar satisfies himself in the prescribed manner that a company registered under the Act has ceased to carry on business, he may strike the company off the register, and it is then to be dissolved. By s. 30, if the registration fees prescribed by the regulations made by the Lieutenant-Governor in

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Council be not paid, the Registrar is to strike the company off the register.

Here again their Lordships think that the Provincial Legislature has failed to confine its legislation to the objects prescribed in s. 92, and has trenched on what is exclusively given by the British North America Act to the Parliament of Canada. If the Act had merely required a Dominion company, within a reasonable time after commencing to carry on business in Saskatchewan, to register its name and other particulars in the Provincial register and to pay fees not exceeding those payable by Provincial companies, and had imposed upon it a daily penalty for not complying with this obligation, it could (their Lordships think) be supported as legitimate machinery for obtaining information and levying a tax. But the effect of imposing upon such a company a penalty for carrying on business while unregistered is to make it impossible for the company to enter into or to enforce its ordinary business engagements and contracts until registration is effected, and so to destroy for the time being the status and powers conferred upon it by the Dominion. Further, if it is the intention and effect of the Act that a Dominion company when registered in the Province shall be subject (by virtue of the definition section or otherwise) to the general provisions of the Saskatchewan Companies Act or shall become liable to dissolution under s. 29, the Act would be open to question on that ground; but it is right to say that such a construction was disclaimed by counsel for the Attorney-General of Saskatchewan and (as regards the liability to dissolution) has been excluded by an amending Act passed while these proceedings were pending. Sect. 25 of the Saskatchewan Act, which requires a Dominion company to obtain a licence, stands on the same footing as the enactments in Ontario and Manitoba which have been held void as ultra vires; and in this case also the restrictions on the holding of land are not severable from the licensing provisions and are invalid on that ground.

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The result is that their Lordships take the view which commended itself to a minority of the judges in the Courts below, and find themselves unable to agree on the main question argued, either with the preponderating opinion expressed in the Supreme Court of Canada on the Saskatchewan and Manitoba legislation, or with that of the majority of the Appellate Division in Ontario on the validity

of the statute of that Province, but that on the subsidiary question as to the Mortmain Act of Ontario they agree with the Ontario Courts.

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The proper course will be to allow the appeals and to declare:—(1.) That in the case of all four appellant companies the provisions of the parts of the Provincial Companies Acts which were the subject of the proceedings in the Courts of the Provinces of Ontario, Manitoba and Saskatchewan, in so far as they purport to apply to the appellant companies respectively, are ultra vires of the Provincial Legislatures in each case, and that these companies are not precluded by reason of not having been licensed or registered under those Acts from carrying on business and exercising their powers in the three Provinces, and are not liable to the penalties prescribed for having so carried on business and exercised their powers. (2.) That in the case of the Province of Ontario none of the appellant companies can acquire and hold lands in the Province without a licence under the Provincial Mortmain Act, and that it is within the power of the other Provincial Legislatures to impose the requirement of a licence directed to this purpose. The judgments of Masten J. in the Ontario cases will be restored, and the other proceedings dismissed.

As regards costs their Lordships were informed that in 1921 2 A.C. the cases in the Courts below it was in certain of the proceedings agreed that there should be no costs. Having regard to the character of the questions raised, and to the circumstance that on one important point, that as to mortmain, the whole of the contentions of the appellants have not been successful, they think that there should be no costs for any of the parties, either of these appeals or in any of the Courts below. p. 125.

They will humbly advise His Majesty in accordance with what has been said.

Solicitors for appellants: *Lawrence Jones & Co.*

Solicitors for respondents: *Blake & Redden; Freshfields & Leese.*

Solicitors for interveners: *Charles Russell & Co.; Freshfields & Leese; Blake & Redden.*

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CANADIAN PACIFIC WINE }
COMPANY, LIMITED..... } APPELLANTS;

AND

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ON APPEAL FROM THE COURT OF APPEAL OF
BRITISH COLUMBIA.

Canada (British Columbia)—Legislative Authority—Provincial Legislation—Liquor Prohibition—Criminal Procedure—Trespasser ab initio—British Columbia Prohibition Act (1916, c. 49, etc., B.C.)—Summary Convictions Act (1915, c. 59, B.C.)—British North America Act, 1867 (30 & 31 Vict. c. 103), s. 91, head 2; s. 92, heads 15, 16.

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p. 418. } The British Columbia Prohibition Act (1916, c. 49, B.C. and amending Acts, consolidated for convenience in 1920) prohibited within the Province the keeping for sale or sale of "liquor" as therein defined, exception being made of liquor kept for export and in certain other cases. Penalties were thereby imposed which were to be recovered or enforced under the Summary Convictions Act (1915, c. 59, B.C.) save so far as the Act itself provided. The Act itself contained sections dealing with procedure, and by ss. 48 and 49 police officers were given a right to search premises without warrant and to seize liquor believed to be intended for sale in violation of the Act. The Summary Convictions Act, 1915, provided procedure for the recovery or enforcement of penalties prescribed by any Act of the Province which did not itself provide the procedure.

The appellants, who were dealers in liquor as importers into and exporters from the Province, had in their warehouse there on July 15, 1920, a large stock of liquor. On a previous date a police officer had gone to the warehouse and purchased liquor, giving in payment marked money. On the date above named the respondent police officers entered the warehouse and seized and removed the whole stock of liquor, together with books and papers and the marked money. A magistrate subsequently convicted the appellants under the Summary Convictions Act, 1915, of an offence under the Prohibition Act, finding that the whole stock of liquor in the warehouse was unlawfully kept there. The appellants sued the respondents claiming replevin and other relief. At the trial the appellants recovered the marked money, as to which there was no appeal. The books and papers were seized under a search warrant issued under the Summary Convictions Act, and had been returned to the appellants:—

Held, (1.) that the two provincial statutes above mentioned were intra vires under the British North America Act, 1867; (2.) that the facts justified the finding of the magistrate; (3.) that the police officers having lawfully entered the appellants' premises did not become trespassers ab initio even if the seizure of the books, papers, and money was unlawful; and (4.) that the appellants were not entitled to any relief other than that which they had obtained at the trial.

Attorney-General of Manitoba v. Manitoba Licence Holders' Association [1902] A.C. 73 and *Attorney-General for Ontario v. Attorney-General for Dominion* [1896] A.C. 348 followed; also (as to trespass ab initio) *Harvey v. Pocock* (1843) 11 M. & W. 740.

Judgment of the Court of Appeal affirmed.

*Present: VISCOUNT BIRKENHEAD L.C., VISCOUNT HALDANE, LORD BUCKMASTER, LORD CARSON, and SIR LOUIS DAVIES.

APPEAL from a judgment of the Court of Appeal of British Columbia (dated April 9, 1921) affirming a judgment of the Supreme Court of that province (Murphy J.).

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The appellants sued the respondents in the Supreme Court, claiming the return of its stock of liquor together with certain books, papers and money seized by police officers, who were respondents, and for damages. The action arose out of proceedings taken by the police under the British Columbia Prohibition Act (1916, c. 49, P.C., and amending statutes). (1) The facts and the relevant statutory provisions appear from the judgment of the Judicial Committee.

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The action was tried by Murphy J., who gave judgment for the money in question—namely, 60 dollars, but in other respects dismissed the action. On an appeal to the Court of Appeal by the present appellants the judgment was affirmed.

1921. July 11, 12. *Sir John Simon K.C., Charles Wilson K.C., and C. S. Arnold* for the appellants. The sections of the Prohibition Act which deal with procedure, including ss. 48 and 49, and the Summary Convictions Act, 1915, as a whole, were ultra vires, since they governed procedure in a criminal matter, and consequently dealt with a subject committed exclusively to the Dominion Legislature by the British North America Act, 1867, s. 91, head 27. Though a province can under s. 92, head 14, constitute a Court, and under head 15 provide a punishment for the infraction of provincial laws, the provisions in question went beyond those matters. Part XV. of the Criminal Code of Canada provided the whole of the procedure needed for the enforcement of criminal law. The intention was that there should be one system of criminal procedure throughout Canada. Further, the Prohibition Act by ss. 19, 57 excluded the appellants' warehouse from the operation of the Act, since they were exporters. Under s. 19 it was only such liquor as was removed from the warehouse that was kept in violation of the Act and liable to seizure under s. 49. If s. 19 did not exclude the appellants' warehouse, it was ultra vires under s. 91, head 2, of the Act of 1867, as an attempt to regulate inter-provincial and foreign trade. There was not material upon which the

(1) The Act was repealed in 1921 by Act 30 of that year.

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police officers could bona fide come to the conclusion that the whole of the liquor in the warehouse was kept in violation of the Act. [Reference was made to *Attorney-General of Manitoba v. Manitoba Licence Holders' Association* (1), also to *R. Dahlin*. (2)] If, however, the original entry was lawful the police officers became trespassers ab initio when they unlawfully seized the money, paper and books: *Smith v. Egginton* (3); *Attack v. Bramwell*. (4) The suggestion that no damage resulted was not material: *Martinello & Co. v. McCormick*. (5) The subsequent conviction of the appellants did not justify the wrongful seizure: *Caine v. Palace Steam Shipping Co.* (6)

S. S. Taylor K.C. for the respondents, and for the Attorney-General of the Province, intervener, was not called upon.

July 21. The judgment of their Lordships was delivered by

VISCOUNT BIRKENHEAD L.C. This is an appeal from a judgment of the Court of Appeal of British Columbia, which affirmed the judgment of the trial judge Murphy J. delivered in the Supreme Court. The action was brought for the return of movable property of the appellants, including books and papers and a stock of liquor, alleged to have been illegally seized, and for damages for such seizure and for unlawful entry into the appellants' warehouse. The respondents, excepting the respondent South, who is a deputy police magistrate, are police officers of the City of Vancouver.

The first question to be decided relates to the constitutional validity of the statutes under which the respondents purported to act. These are the British Columbia Prohibition Act, as consolidated in 1920, and the Summary Convictions Act, 1915.

The former statute provides by s. 10 that, subject to exceptions not here material, no person shall within the Province, by himself, his clerk, servant, or agent, expose or keep for sale, on any pretence or upon any device sell or barter, or offer to sell or barter, or in consideration of

(1) [1902] A.C. 73.

(2) (1919) 27 B.C. Rep. 564.

(3) (1837) 7 Ad. & E. 167, 176.

(4) (1863) 3 B. & S. 520.

(5) (1919) 59 Can. S.C.R. 394.

(6) [1907] 1 K.B. 670; affd. [1907] A.C. 386.

the purchase, a transfer of any property or thing, or for any other consideration, or at the time of the transfer of any property or thing, give to any other person, any liquor. By s. 11 the keeping, having, or giving of liquor in any place other than the private dwelling house where a person resides is prohibited. Sect. 19 provides that nothing in the Act shall prevent the keeping of liquor for export, provided that the warehouse in which it is kept complies with certain requirements in default of the observance of which it is not to be deemed to be a warehouse within the Act, or from selling from such warehouse liquor to persons in other provinces, or in foreign countries, or to a vendor under the Act. By an amendment introduced into the Act in 1919 by way of an addition to s. 19, it is provided that any person who has liquor in a warehouse shall furnish the Commissioners under the Act with certain information as to the warehouse and the liquor in it, and as to all removals from it of such liquor, with its destination, and the Commissioner or his agent authorized in writing may enter and make such searches in the warehouse as he thinks necessary for the purpose of obtaining or confirming information. Penalties imposed under the Act are by s. 30 to be recoverable under the provisions of the Summary Convictions Act. By s. 48 the Commissioner, Superintendent or any police officer, are for the purpose of detecting the violation of any of the provisions of the Act to have power, where it is believed that liquor is kept contrary to its provisions, to enter and search, and break open lockfast places, and any one who obstructs such entry is to be guilty of an offence against the provisions of the Act. By s. 49 if the Commissioner, Superintendent, or any police officer believes that liquor intended for sale in violation of the Act is concealed in the vehicles or on the land of any person, he or they are to have power without warrant to search for and seize such liquor and the vessels in which it is kept, and by s. 50 the justice who convicts for the keeping of liquor contrary to the provisions of the Act, may declare the liquor and the vessels to be forfeited. By s. 28 every person contravening or committing any breach of the provisions of s. 10 is made liable to fine or imprisonment, and further, for every offence against the Act for which a penalty has not been specially provided, penalties of fine or imprisonment are enacted.

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The above summary represents sufficiently for the purposes of the present appeal, the main provisions of the statute. Their Lordships are of opinion that it was within the power of the Legislature of British Columbia to enact it. The case is in their opinion governed by the principles enumerated when their decision was given in favour of the Province of Manitoba on the interpretation of ss. 91 and 92 of the British North America Act, 1867, in *Attorney-General of Manitoba v. Manitoba Licence Holders' Association*. (1)

The second statute under which the proceedings of the police are justified in the present proceedings, and which in turn is impeached, is the Summary Convictions Act of the province. This statute provides (s. 2) that in every case in which a penalty or imprisonment is prescribed by any statute of the Province, and it is not provided in such statute in what manner or by what procedure such penalty or punishment may be recovered or enforced, such penalty or imprisonment shall be enforced on summary conviction before a justice (including a police magistrate) as if the same was expressly so declared in such statute. By s. 4, the Act is to apply to cases in which any person commits or is suspected of having committed any offence or act over which the Legislature has legislative authority, and for which such person is liable on summary conviction to imprisonment, fine, or other punishment; and to cases in which a complaint is made to any justice in relation to any matter over which the Legislature has such authority, and with respect to which the justice has authority by law to make any order for the payment of money or otherwise. The Act further contains provisions for procedure, and for enabling, under s. 11, the justice to detain anything seized and brought before him for the purposes of evidence.

It was contended at the Bar that this statute was ultra vires of the provincial Legislature, on the ground that it was an attempt to enact provincial legislation for "criminal law," including procedure in criminal matters, within the words of s. 91, head 27, of the British North America Act. But that section only declared that it is to be lawful for the Sovereign, with the advice of the Dominion Parliament, to make laws for the peace, order and good government of

Canada generally, in relation to all matters not coming within the classes of subjects by the Act exclusively assigned to the Legislatures of the provinces, and the enumeration of matters which follows in s. 91 to which the exclusive authority of the Dominion Parliament extends is only a declaration that certain subjects fall under this description. When the language of s. 92, which defines the matters to which the exclusive legislative authority of the province extends, is scrutinized, this definition is found to include the administration of justice in the provinces embracing the constitution, maintenance and organization of provincial Courts, both civil and criminal, and procedure in civil matters in these Courts. Head 15 of s. 92 expressly adds the imposition of punishment by fine, penalty or imprisonment, for enforcing any law of a province, made in relation to any of the classes of subject enumerated in the section; and head 16 gives exclusive legislative power to the provincial Legislatures in all matters of a merely local character. Reading ss. 91 and 92 together, their Lordships entertain no doubt that the Summary Convictions Act was within the competence of the Legislature of British Columbia. It relates only to punishment for offences against the provisions of the statutes of the province, and is to be read as if the provisions to this end were expressly declared in some such statute. No other conclusion would appear to be in harmony with the principle of construction laid down by the Judicial Committee in *Attorney-General for Ontario v. Attorney-General for the Dominion*. (1)

The two preliminary constitutional points having thus been disposed of, their Lordships turn to the facts as proved in the proceedings.

The appellants are dealers in liquor, as importers into the Province and exporters from it, in the City of Vancouver. They possess a warehouse in that city where, on July 15, 1920, they had a large stock of liquor. On that date the respondents, Tuley, Sutherland, Copelands and Thompson, who were police officers, entered the warehouse. Previously some 60 dollars had been marked and handed to a police officer, who had gone to the warehouse to ascertain whether liquor for that amount would be unlawfully sold to him by the appellants. It was so sold and the money in payment

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(1) [1896] A.C. 348. See also *Toronto Ry. Co. v. Toronto City* [1920] A.C. 426, 452.

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therefor was accepted. When the respondents above mentioned entered, they seized the whole stock of liquor there, with the money marked referred to above, and subsequently removed the liquor, books and papers of the appellants from the warehouse. On July 19 one of the respondents, South, laid an information against the appellants under the Summary Convictions Act for unlawfully keeping liquor for sale. On this information the deputy police magistrate before whom the proceedings came convicted the appellants, finding that all the liquor in the warehouse was unlawfully kept there. He ordered it to be confiscated and fined the appellants. On August 9, 1920, the appellants issued the writ in this action claiming replevin and other relief. In due course the action came for trial before Murphy J. The learned judge held that the appellants were entitled to recover the 60 dollars first paid by the police and afterwards seized by them. Whether this decision was right or not, there is no cross-appeal with regard to it. But he further held that the confiscation order of the police magistrate was valid. A second point was made before him to the effect that even if the entry and seizure were lawful, the police became trespassers ab initio, because they seized and carried away the money and books without the authority of a search warrant. But the learned judge held that, even if there were no authority in the terms of the Prohibition Act for these seizures, this fact did not make the police trespassers ab initio. In so far as the seizure of the liquor was concerned, their Lordships agree with Murphy J. This seizure must be taken to be within the statute on the facts proved. *The Six Carpenters Case* (1) left the further point which arises from the unauthorized seizure of other properties unsettled. But it was subsequently disposed of by the judgment of the Court of Exchequer in *Harvey v. Pocock*. (2) There a landlord had taken in distraint, along with chattels that were distrainable, others that were not. It was decided that the distrainer was a trespasser ab initio only as to the goods that were not properly distrainable. Lord Abinger C.B., delivering the judgment of the Court, which included Gurney B. and Rolfe B., decided that the opinion of Lord Holt in *Dod v. Monger* (3) ought to be followed, and that where there is an

(1) (1609) 8 Rep. 146a.

(2) 11 M. & W. 740.

(3) (1704) 6 Mod. 215.

abuse of part only of the distress, the distrainer is not a trespasser ab initio as to what was rightly distrained. Their Lordships find themselves in agreement with this statement of the law. The learned judge held further that the books and papers seized were taken under a search warrant properly issued under the Summary Convictions Act. In any event these books and papers appear to have formed the subject of a separate proceeding, and to have been returned to the appellants. Their Lordships do not think that any substantial question arises with regard to them.

The Court of Appeal affirmed the judgment of the trial judge without adding to the reasons he gave for his judgment.

For the reasons indicated, the Board will humbly advise His Majesty that this appeal should be dismissed. There will be no order as to costs.

Solicitors for appellants: *Budd, Johnson, Jecks & Colclough.*

Solicitors for respondents and intervener: *Leonard & White.*

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ON APPEAL FROM THE COURT OF APPEAL OF BRITISH
COLUMBIA.

Canada—Constitutional Law—Disallowance of Provincial Act—Accrued Title—Registration—Railway Lands—“Reasonable Proof”—3 & 4 Edw. 7 (B.C.), c. 54, s. 3—7 & 8 Edw. 7 (B.C.), c. 71—British North America Act, 1867 (30 & 31 Vict. c. 3), ss. 56, 90; s. 91, head 10.

Disallowance by the Governor-General of Canada, under ss. 56, 90 of British North America Act, 1867, of a Provincial Act in virtue of which a Crown grant of land in the Province has been issued before the disallowance, does not invalidate the title of the grantee. An absence of registration of the grant under a Land Registry Act of the Province is not material if the grantee before the disallowance applied for and was entitled to registration, whether or not under other circumstances absence of registration would invalidate the title.

Where the Lieutenant-Governor of a Province has authority by statute to issue Crown grants upon “reasonable proof” of certain facts, his function is judicial, but he is not bound to follow the rules regulating proceedings in a court of justice, and if there is before him some proof of the necessary facts, it is within his discretion to determine that there is “reasonable proof.”

Local Government Board v. Arlidge [1915] A. C. 120 applied.

Provincial lands vested by statute in a railway company which has been declared by a Dominion statute to be “a work for the general advantage of Canada,” within s. 91, head 10, of the British North America Act, 1867, are subject to a statute of the Province authorizing the issue of Crown grants of the lands, save so far as the lands are part of the “railway” as defined by s. 2, sub-s. 21, of the Railway Act (R. S. Can., 1906, c. 37).

Judgment of the Court of Appeal reversed.

APPEAL and CROSS APPEAL from a judgment (February 3, 1921) of the Court of Appeal of British Columbia affirming, subject to a variation, a judgment (August 12, 1920) of Gregory J.

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The action was brought by the respondent company in the Supreme Court of British Columbia to establish its title to the coal and other minerals underlying certain lands in Vancouver Island, which were vested in the company by a Dominion Crown grant dated April 21, 1887, and

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for a declaration that a Provincial Crown grant dated February 15, 1918, to the executors of one Ganner, and purporting to be made under the Vancouver Island Settlers' Rights Act, 1904, Amendment Act, 1917 (7 & 8 Edw. 7, B.C., c. 71), was null and void and for consequential relief. The appellants in the main appeal were Ganner's executors, the Attorney-General for British Columbia, and the Granby Consolidated Mining, Smelting and Power Co., Ltd., which company claimed under a conveyance by Ganner's executors.

The facts and the relevant statutory enactments appear from the judgment of the Judicial Committee.

The trial judge (Gregory J.) gave judgment for the respondents, being of opinion that they had not had a proper hearing upon the application by Ganner's executors for the Crown grant. Upon appeal to the Court of Appeal the judgment in favour of the respondents was affirmed (McPhillips J. dissenting) with a variation with regard to the measure of damages. The learned judges who formed the majority were of opinion that there was no proper hearing and that there was not "reasonable proof" within s. 3 of the Act of 1904 justifying the issue of the Crown grant.

The cross-appeal was as to the measure of damages; upon that question the arguments are not reported.

1921. July 25, 26. *Sir John Simon K.C., Hon. Sir M. Macnaghten K.C., and H. B. Robertson K.C.* for the appellants. The British North America Act, 1867, by s. 56 provides that the disallowance of an Act "shall annul" it. The effect is to "annul" everything done under the disallowed Act. It is not contended that a disallowance is the same in effect as a refusal by the Lieutenant-Governor to assent to an Act; or that it entitles the appellants to claim mesne profits. Disallowance operated as a defeasance of the grantees' title. The cases as to the effect of the repeal of an Act afford little help, but reference may be made to *Kay v. Goodwin* (1) and *Surtees v. Ellison*. (2) Secondly, the railway having been declared to be a work for the general advantage of Canada, was removed from the Provincial legislative authority by s. 91, head 29, and s. 92, head 10. The appellants had the right to carry their line through the railway belt where they chose, and that right could not be interfered with under a Provincial statute: *Attorney-General*

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(1) (1830) 6 Bing. 576.

(2) (1829) 9 B. & C. 750.

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for *Alberta v. Attorney-General for Canada* (1); *Attorney-General for British Columbia v. Canadian Pacific Ry.* (2). Thirdly, the Crown grant was ineffective because it was not registered under s. 104 of the Land Registry Act. The application to register does not help the grantee because the appellants were already on the register. The Settlers' Act did not direct the registrar to remove the appellants' name, and after the disallowance the grantee had no right to have his name substituted.

Fourthly, the grant under the Settlers' Act was invalid in that the appellants had not a proper opportunity to place their objections before the Lieutenant-Governor, and he acted without reasonable proof. He was bound to act judicially: *Local Government Board v. Arlidge* (3). That duty was increased by the fact that the issue of a grant acted as a forfeiture of the appellants' title. [Reference was also made to *Esquimalt & Nanaimo Ry. Co. v. Granby Consolidated Mining Co.* (4); *Esquimalt & Nanaimo Ry. Co. v. Wilson* (5); and *Esquimalt & Nanaimo Ry. Co. v. Fiddick*. (6)]

S. S. Taylor K.C. for the respondents, being called on only as to the question of ultra vires, said that the respondents did not contend that the Crown grant entitled them to interfere with the appellants' railway rights.

Nov. 18. The judgment of their Lordships was delivered by

MR. JUSTICE DUFF. This is an appeal from the judgment of the Court of Appeal of British Columbia of February 3, 1921, affirming the judgment of the trial judge, Gregory J., in favour of the respondent company in which their Lordships have to consider the effect of the Vancouver Island Settlers' Rights Act of 1904 and of the amending Act of 1917 that was subsequently disallowed, as well as the effect of that disallowance upon the rights of the grantees under Crown grants issued by authority of those enactments.

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Two actions were brought by the respondent company to establish its title to certain lands comprised in a grant to the appellants professedly made under the authority of the statutes mentioned.

(1) [1915] A.C. 363.

(2) [1906] A.C. 204.

(3) [1915] A.C. 120, 150.

(4) [1920] A.C. 172.

(5) [1920] A.C. 358.

(6) (1908) 14 B.C. Rep. 412.

A history of the legislation and other public and private proceedings and transactions affecting more or less directly the land whose title is in controversy would be a rather voluminous one, but it is unnecessary now to enter into that history in detail. Admittedly, these lands are situated in a considerable district in Vancouver Island known as the Esquimalt and Nanaimo Railway Belt; a tract of land granted by a Provincial statute to the Dominion Government in execution of the terms of an arrangement arrived at in the year 1883 in settlement of disputes between the two Governments, and in turn by the Dominion Government, pursuant to the same arrangement, granted to the Esquimalt and Nanaimo Railway Company (the respondent company) as a subsidy in aid of the construction of a line of railway (the Esquimalt and Nanaimo Railway) in Vancouver Island. But for the legislation of 1904 and 1917 the respondent company's title would be indisputable.

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In 1904 the Vancouver Island Settlers' Rights Act was passed by the Legislature of British Columbia; the relevant provisions of it being these: "Sect. 2. In this Act, unless the context otherwise requires: (a) 'Railway Land Belt' shall mean the lands described by Section 3 of Ch. 14 of 47 Vict., being 'An Act relating to the Island Railway, the Gravingdock, and Railway lands of the Province.' (b) 'Settler' shall mean a person who, prior to the passing of the said Act, occupied or improved lands situate within the said railway land belt, with the bona fide intention of living thereon.

"Sect. 3. Upon application being made to the Lieutenant-Governor in Council, within twelve months from the coming into force of this Act, showing that any settler occupied or improved land within said railway land belt prior to the enactment of Ch. 14 of 47 Vict., with the bona fide intention of living on said land, accompanied by reasonable proof of such occupation or improvement and intention, a Crown grant of the fee simple in such land shall be issued to him, or his legal representative, free of charge and in accordance with the provisions of the Land Act in force at the time when said land was first so occupied by said settler."

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By a judgment of this Board in *McGregor v. Esquimalt & Nanaimo Ry. Co.* (1) it was decided that a grant under the statute of 1904 had the effect, as to the lands comprised in the grant, of displacing the title of the railway company and vesting a title in fee simple in the grantee. The time limit of twelve months fixed, by s. 3 of the statute of 1904, was extended by a statute of 1917 to September 1 of that year.

On July 5, 1917, the appellants, Wilson and McKenzie, as executors of Joseph Ganner, deceased, applied under the Act of 1917 for a Crown grant of the lands in dispute alleging that Joseph Ganner in his lifetime and before December 19, 1883, the relevant date mentioned in s. 3 of the Act of 1904, had improved these lands with a bona fide intention of living thereon; this allegation being supported by statutory declarations of the executors and others. The late Joseph Ganner had already in his lifetime received a conveyance of these lands, "less the right of way for the railway," by deed reserving to the company the right to take timber for railway purposes, "rights of way for their railway" and the right to enter and to take such land as might be required for stations and workshops and excepting all minerals including coal; and subsequently, pursuant to this application on February 15, 1918, a Crown grant was issued purporting to convey to Wilson and McKenzie, as executors of Ganner, a title in fee simple to the land applied for, subject only to certain exceptions and reservations in favour of the Crown. On May 30, 1918, the Governor-General by an Order in Council disallowed the Act of 1917.

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The Court of Appeal, with the exception of McPhillips J., who dissented, concurred with the trial judge, Gregory J., in holding, though not precisely upon the same grounds, that the authority vested in the Lieutenant-Governor in Council by the statutes of 1904 and 1917 was subject to certain conditions that had not been observed in the proceedings resulting in the issue of the grant, which they decided was consequently invalid. The questions which thus engaged the attention of the Courts below will require discussion, but, in the meantime, it is more convenient to deal with the points arising in consequence of the fact that in the year 1905, that is to say, after the passing of the Act of 1904, but before the passing of the Act of 1917, the

"railway" of the respondent company was, by an Act of Parliament of Canada (c. 90, s. 1), declared to be "a work for the general advantage of Canada"; the word "railway" in this statute signifying by force of s. 2, sub-s. 21, of the Dominion Railway Act (R.S. Can., 1906, c. 37): "Any railway which the company has authority to construct or operate, and . . . all branches, sidings, stations, depots, wharfs, rolling stock, equipment, stores, property, real or personal, and works connected therewith, and also any railway bridge, tunnel, or other structure which the company is authorised to construct."

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Upon the passing of the Act of 1905, in virtue of the enactments of s. 91, head 29, and s. 92, head 10, of the British North America Act, 1867, the "railway" of the respondent company passed within the exclusive legislative jurisdiction of the Parliament of Canada and, accordingly, their Lordships think the Legislature of the Province ceased to possess the authority theretofore vested in it under head 10 of s. 92 and head 13 of the same section of that Act, to deprive the railway company of its legal title to any of the subjects actually forming part of the "railway" so declared to be "a work for the general advantage of Canada," and to vest that title in another. It does not follow, however, that lands acquired by the railway company as a subsidy granted for the purpose of aiding in the construction of the railway and not held by the company as part of its "railway" or of its undertaking as a railway company were withdrawn from the legislative jurisdiction of the Province in relation to "property and civil rights"; and, in their Lordships' opinion, that authority was, notwithstanding the enactment of the Dominion Act of 1905, still exercisable in relation to such subjects.

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On the other hand, as their Lordships have already noticed, the railway company was, by virtue of the stipulations contained in the conveyance to Ganner, the owner of certain rights (to take timber for railway purposes, rights of way for the railway, to take land for stations and workshops), which rights, it cannot be denied, were held by the company as part of its railway undertaking. Whether or not they were actually part of the "work," that is to say of the "railway" declared to be "a work for the general advantage of Canada," these rights were so identified with the railway undertaking as to justify the most serious doubts whether

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they could legally be swept away or impaired by Provincial legislation. And it was with entire propriety that Mr. Taylor, as counsel for the appellants, agreed that all lands and all such rights as ought to be considered as part of the railway undertaking should be treated as excluded from the operation of the grant.

Indeed, the real controversy seems to concern the coal only, and as regards the coal it appears to have been so dealt with that it would be impossible to regard it as any longer a part of the railway undertaking, though in respect of the working of it, in so far as such working may affect the railway, all parties are of course under the control of the Board of Railway Commissioners.

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The question that was principally discussed before their Lordships' Board was that presented by the contention of the respondent company concerning the effect of the disallowance of the Act of 1917, by which it is argued the grants already made to the appellants are nullified. In relation to this question the pertinent sections of the British North America Act are ss. 56 and 90. By the first of these a power of disallowance in respect of Dominion Acts is vested in the Queen in Council; by s. 90 the provisions of s. 56 are (inter alia) made applicable to statutes passed by the Provincial legislatures, the Governor-General in Council being substituted as disallowing authority for the Queen in Council, and the period of two years named in s. 56 being reduced to one year.

Textually, s. 56 is as follows: "Where the Governor-General assents to a Bill in the Queen's name, he shall by the first convenient opportunity send an authentic copy of the Act to one of Her Majesty's Principal Secretaries of State, and if the Queen in Council within two years after receipt thereof by a Secretary of State thinks fit to disallow the Act, such disallowance (with a certificate by the Secretary of State of the day on which the Act was received by him) being signified by the Governor-General, by speech or message to each of the Houses of the Parliament or by Proclamation, shall annul the Act from and after the day of such signification." For the purposes of the present appeal the point under examination turns, as their Lordships think, upon the effect to be ascribed to the words "shall annul the Act from and after the day of such signification."

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Cases may no doubt arise giving place for controversy touching the application of this phrase, but their Lordships think that the language itself discloses with sufficient clearness an intention that, at all events as to private rights completely constituted, and founded upon transactions entirely past and closed, the disallowance of a Provincial statute shall be inoperative.

It is important in construing such a provision to consider the probable tendency of any proposed construction in relation to its effect upon the working of the constitutional system set up by the British North America Act, and from this point of view the construction advocated by the appellants is open to two objections of not a little weight. If private rights that have been finally constituted under Provincial legislation are swept away by disallowance—which may take place at any time up to the expiration of a year after the enactment of the legislation—then Provincial legislation may obviously become the subject of a considerable degree of doubt as to its ultimate operation and effect. This uncertainty would, of course, be much limited in its practical incidence by recognized constitutional conventions restricting the classes of cases in which disallowance is permissible; but it is indisputable that in point of law the authority is unrestricted, and under conceivable conditions the uncertainty touching the fate of Provincial enactments might be productive of some degree of general inconvenience. Another objection of some practical importance lies in the probability that under the proposed construction the Dominion Government when considering the advisability of disallowing a Provincial enactment in circumstances making the exercise of the power proper and desirable on general grounds would encounter embarrassments (otherwise not likely to arise) by reason of apprehensions as to the consequences of its action upon the rights and interests of private individuals.

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It was urged by counsel for the respondent company that these considerations have no relevancy in the present controversy, since (it is argued) force of by s. 104 of the Land Registry Act the Crown grant upon which the appellants' right is founded could not vest a title or an interest in the lands comprised in the grant until the grant had been registered in the proper Land Registry Office; and that, admit-

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tedly, registration had not in fact taken place at the time the Act was disallowed.

The appellants (to advert briefly to the facts), having applied for the registration of their title, were met with the objection that a *lis pendens* having been filed in the action out of which this appeal arises (and in another action which has since been dismissed), the title ought not to be registered until the *lis pendens* has been removed. To this objection the registrar gave effect, and his decision, which had been reversed by the Court of Appeal, was, on appeal to His Majesty in Council, eventually sustained.

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Their Lordships have now to decide whether or not the actions in respect of which the *lis pendens* was filed should be dismissed and the *lis pendens* vacated. And their Lordships having for the reasons now given, some of which are yet to be explained, come to the conclusion that the actions are not well founded, it follows that the appellants had, when they applied for registration, a completely constituted right to register their title; though the exercise of that right was, in consequence of the proceedings taken by the respondent company, suspended pending the determination of the questions which the company itself had raised. Their Lordships entertain no doubt that such a right is one of the class of rights intended to be protected by s. 56 of the British North America Act.

It should not, however, be assumed that their Lordships are in accord with the contention that s. 104 of the Land Registry Act applies either to grants of a special character, such as those authorized by the legislation of 1904 and 1917, or to ordinary Crown grants issued under the authority of the Land Acts. On these points their Lordships express no opinion.

The last point for consideration arises in consequence of the contention of the respondent company (to which the Court of Appeal gave effect) that the powers of the Lieutenant-Governor in Council under the legislation of 1904 and 1917 were not validly exercised, inasmuch as certain conditions, some expressly, others impliedly, attached to those powers were not observed.

The statute of 1904 no doubt requires that before the authority to issue a Crown grant under s. 3 is acted upon, the Lieutenant-Governor in Council shall decide the

question whether or not there is "reasonable proof" of "improvement" or "occupation" and of intention to reside; and their Lordships consider that the function of the Lieutenant-Governor in Council in deciding upon such questions is judicial in the sense that he must, to adapt the language of Lord Moulton in *Arlidge's Case* (1), "preserve a judicial temper" and perform his duties "conscientiously with a proper feeling of responsibility" in view of the fact that a decision in favour of the applicant must result in the transfer to the applicant of property to which, but for the statute and but for the production of the necessary proof, the respondent company (or its successors in title) would have possessed an unassailable right; and it may be assumed for the purposes of this appeal that a grant issued in consequence of a decision arrived at through proceedings wanting in these characteristics would be impeachable by the respondent company (or its successors), as issued without authority or in abuse of the authority which the statute creates.

There are two grounds upon which this contention is supported.

First it is said that the respondents were denied an adequate opportunity of showing that the essential allegations made on the application were not well founded in fact, and second that in the material produced there was no "reasonable proof" of those allegations.

The second of these grounds is that upon which the judgment of the majority of the Court of Appeal proceeded. The judgment of the learned Chief Justice, with whom Gallihier J. concurred, contains a searching examination of the evidence adduced, leading him to the conclusion that no such "reasonable proof" was before the Lieutenant-Governor in Council. The reasons of the learned Chief Justice are cogent reasons in support of the conclusion that the allegations of the appellants' petition were not supported by complete evidence; but their Lordships do not think that this, if established to the satisfaction of the Court of Appeal, was necessarily conclusive in favour of the respondent company.

Whether or not the proof advanced was "reasonable proof" was a question of fact for the designated tribunal,

(1) [1915] A.C. 120, 150.

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and the decision by the Lieutenant-Governor in Council in the affirmative could not be questioned in any Court so long, at all events, as it was not demonstrated that there was no "proof" before him which, acting judicially, he could regard as reasonably sufficient.

This the majority of the Court of Appeal has held to be shown. But the Chief Justice, at all events, who examined the evidence in detail, and Galliher J. (who concurred with him), proceeded largely upon the view that, generally, the deponents seem to speak without personal knowledge of the facts to which they depose, and such statements he seems to put aside entirely as valueless if not altogether incompetent. Their Lordships think the Lieutenant-Governor in Council was not bound by the technical rules of British Columbia law touching the reception of hearsay evidence, and they think there was nothing necessarily incompatible with the judicial character of the inquiry in the fact that such evidence was received. Ganner, as already mentioned, did in fact acquire the surface rights in 1885; and the proof includes formal depositions by the executors and others to the effect that Ganner "squatted" on the land in question in 1883 with the intention of residing thereon, and that he was in that year engaged in improving it, as well as a statement by his son that he, with others, personally assisted in working on this land preparatory to "clearing" it in that year. While appreciating both the relevancy and the force of the comments made upon this evidence in the Court below, their Lordships are constrained to think that there was some evidence in support of the application, and that there is no adequate reason for holding that this evidence might not be properly considered to be reasonably convincing.

Similar considerations apply to two other criticisms upon the course taken by the Lieutenant-Governor in Council, those, namely, touching the refusal to direct the production of the deponents for cross-examination, and the refusal to grant an adjournment for the purpose of enabling the company to adduce evidence in opposition to the application.

The respondents were given the fullest opportunity to present before the Lieutenant-Governor in Council everything they might desire to urge against the view that the

depositions produced in themselves constituted "reasonable proof," and they had the fullest opportunity also of supporting their contention that the depositions alone, in the absence of cross-examination, ought not to be considered sufficient, and that further time should be allowed to enable them to prepare their case. The appointed authority for dealing with the matter, it must be remembered, was the Executive Government of the Province directly answerable to the Legislature, and their Lordships agree without hesitation with the majority of the Court of Appeal in holding as they explicitly decided upon the same facts in Dunlop's case (1), that the Lieutenant-Governor in Council was not bound to govern himself by the rules of procedure regulating proceedings in a Court of justice.

It cannot be suggested that he proceeded without any regard to the rights of the respondents and the procedure followed must be presumed, in the absence of some conclusive reason to the contrary, to have been adopted in exercise of his discretion under the statute as a proper mode of discharging the duty entrusted to him. His decisions taken in the exercise of that discretion are, in their Lordship's opinion, final and not reviewable in legal proceedings.

On these grounds their Lordships consider that the appeal in substance succeeds. The respondent company is, however, for the reasons mentioned, entitled to a declaration that the Crown grant does not operate to take away or to prejudice the company's title to its right of way as at present established, or to its rights under the deed of conveyance to Ganner of 1890, already mentioned, to take timber and to use the surface for railway purposes. As no contention in respect of these rights of the company appears to have been seriously pressed in the Courts below it may be assumed that they are of little or no practical value; and their Lordships, therefore, think that the respondent company's success upon this minor point should not affect the question of costs.

For these reasons their Lordships think that the appeal should be allowed with costs here and of the appeal to the

(1) The appeal *Esquimalt & Nanaimo Ry. Co. v. Dunlop* raised the same questions of law as the appeal here reported, and was heard at the same time. Their Lordships dismissed the appeal subject to the variation directed in the present case.

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Court of Appeal and the actions dismissed with costs throughout, and subject to the declaration above mentioned, that the cross-appeal should be dismissed with costs. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants: *White & Leonard*.

Solicitors for respondents: *Linklaters & Paines*.

[PRIVY COUNCIL.]

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AND THE COMBINES AND FAIR PRICES ACT, 1919.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

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p. 191.*Canada—Legislative Power of Dominion—Combines and Fair Prices Act, 1919—Property and Civil Rights—General Legislative Power of Dominion—British North America Act, 1867 (30 & 31 Vict. c. 3), s. 91; s. 92, head 2.*

The Combines and Fair Prices Act, enacted by the Parliament of Canada in 1919, authorized the Board of Commerce, created by another statute of that year, to restrain and prohibit the formation and operation of such trade combinations for production and distribution in the Provinces as that Board might consider to be detrimental to the public interest; the Board might also restrict accumulation of food, clothing, and fuel beyond the amount reasonably required, in the case of a private person for his household, and in the case of a trader for his business, and require the surplus to be offered for sale at fair prices; and the Board could attach criminal consequences to any breach of the Act which it determined to be improper:—

Held, that the Acts were ultra vires the Dominion Legislature, since they interfered seriously with "property and civil rights in the Provinces," a subject reserved exclusively to the Provincial Legislatures by s. 92, head 2, of the British North America Act, 1867, and were not passed in any highly exceptional circumstances, such as war or famine, which conceivably might render trade combinations and hoarding subjects outside the heads of s. 92 and within the general power given by s. 91. The power of the Dominion Legislature to pass the Acts in question was not aided by s. 91, head 2 (trade and commerce), since they were not within the general power; nor by s. 91, head 27 (the criminal law), because the matter did not by its nature belong to the domain of criminal jurisprudence.

APPEAL by special leave from the Supreme Court of Canada upon a case stated.

The appeal related to the validity of two Acts passed by the Parliament of Canada in 1919—namely, the Board of Commerce Act (9 & 10 Geo. 5, Dom., c. 37) and the Combines and Fair Prices Act (9 & 10 Geo. 5, Dom., c. 45). A case was stated under s. 32 of the first-named Act for the opinion of the Supreme Court of Canada as to the validity of an order made by the Board of Commerce under the Acts, restraining certain manufacturers of clothing in the City of Ottawa in respect of the sale prices of clothing.

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The effect of the Acts in question appears from the judgment of the Judicial Committee.

* *Present*: VISCOUNT HALDANE, LORD BUCKMASTER, VISCOUNT CAVE, LORD PHILLIMORE, and LORD CARSON.

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The learned judges of the Supreme Court delivered their opinions on June 1, 1920, and being equally divided no judgment was rendered. Sir Louis Davies C.J. and Anglin and Mignault JJ. were of opinion that the order and the Acts upon which it was based were valid; Idington, Duff and Brodeur JJ. were of the contrary opinion. The proceedings in the Supreme Court are reported at 60 Can. S. C. R. 456.

1921. July 14, 15, 16. *Newcombe K.C.* and *T. Mathew* for the Attorney-General for Canada. It was within the powers of the Parliament of Canada under ss. 91 and 101 of the British North America Act, 1867, to constitute the Board of Commerce as a Court of record to enforce the Combines and Fair Prices Act, 1919. That Act dealt with public evils prevailing throughout the Dominion, not matters which were of a merely local nature, or otherwise competent to any Provincial Legislature. The legislation was therefore intra vires under the general power in s. 91 to legislate for the peace, good order, and government of Canada. The legislation also fell within the express words of s. 91, head 2 (the regulation of trade and commerce). It was not an attempt to regulate any particular trade, nor otherwise within the limitations which have been held to apply to that head: *Citizens Insurance Co. v. Parsons*. (1) If the legislation is within that, or any other, specific head of s. 91, it is not material that it is within s. 92 having regard to the final words of the latter section. The legislation also fell within s. 91, head 27 (the criminal law, etc.). The criminal provisions were to be administered by Provincial Courts, though no doubt the facts were to be passed by the Board. It is conceded that this head would not be applicable if the criminal provisions are merely provided as sanctions for provisions which are ultra vires; that however is not the case. The matter of trade combines and profiteering was of such great importance that the Parliament of Canada had power to legislate even if it interfered to some extent with subjects reserved to the Provincial Legislature. That principle is recognized in the *Prohibition Case*. (2)

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Sir John Simon K.C. *Lanctot K.C.* and *M. Alexander* for the Attorney-General for Quebec. The Acts were invalid, since they seriously interfered with civil rights in the Provinces, a subject within the exclusive legislative

(1) (1881) 7 App. Cas. 96.

(2) [1896] A.C. 348, 361.

power of the Provinces by s. 92, head 2. The Board of Commerce Act by s. 39 provides that any order of the Board is to have effect as though enacted in the Act. If the order now under consideration were set out as part of the Act it obviously would interfere with the civil rights of the particular traders in Ottawa against whom it was made. The subject of the Acts was not "the regulation of trade and commerce." That head does not include the prohibiting a person from selling save at an arbitrarily fixed price: *Prohibition Case*. (1). Nor was the subject "the criminal law, etc." The penal provisions are merely ancillary. Further, the Board is constituted a Court of criminal jurisdiction, a Provincial matter under s. 92, head 14. The general words in s. 91 cannot be used to overcome specific heads of s. 92: *Prohibition Case* (2); *Insurance Act Case*. (3) The Acts were not passed during the war and the suggested principle that under abnormal conditions the general power of the Dominion may override the specific powers under s. 92 can have no application.

Geoffrey Lawrence for the Attorney-Generals of Ontario and Alberta.

Newcombe K.C. replied.

Nov. 11. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. This is an appeal from the Supreme Court of Canada, before which were brought, under statute, questions relating to the constitutional validity of the Acts above mentioned. As the six judges who sat in the Supreme Court were equally divided in opinion, no judgment was rendered. The Chief Justice and Anglin and Mignault JJ. considered that the questions raised should be answered in the affirmative, while Idington, Duff and Brodeur JJ. thought that the first question should be answered in the negative and that therefore the second question did not arise. These questions were raised for the opinion of the Supreme Court by a case stated under s. 32 of the Board of Commerce Act, 1919, and were; (1.) whether the Board had lawful authority to make a certain order; and (2.) whether the Board had lawful authority to require the Registrar, or other proper authority of the Supreme Court

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(1) (1896) A.C., 348, 362, 366.

(2) [1896] A.C. 348, 366.

(3) [1916] 1 A.C. 588, 595.

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of Ontario, to cause the order, when issued, to be made a rule of that Court.

The order in question was to the effect that certain retail dealers in clothing in the City of Ottawa were prohibited from charging as profits on sales more than a certain percentage on cost, which was prescribed as being fair profit. The validity of this order depended on whether the Parliament of Canada had legislative capacity, under the British North America Act of 1867 to establish the Board and give it authority to make the order.

The statutes in question were enacted by the Parliament of Canada in 1919, and were to be read and construed as one Act. By the first of these statutes, the Board of Commerce Act, a Board was set up, consisting of three commissioners appointed by the Governor-General, which was to be a Court of Record. The duty of the Board was to be to administer the second of the two statutes in question, the Combines and Fair Prices Act, called the Special Act. It was to have power to state a case for the opinion of the Supreme Court of Canada upon any question which, in its own opinion, was one of law or jurisdiction. It was given the right to inquire into and determine the matters of law and fact entrusted to it, and to order the doing of any act, matter or thing required or authorized under either Act, and to forbid the doing or continuing of any act, matter or thing which, in its opinion, was contrary to either Act. The Board was also given authority to make orders and regulations with regard to these, and generally for carrying the Board of Commerce Act into effect. Its finding on any question of fact within its jurisdiction was to be binding and conclusive. Any of its decisions or orders might be made a rule or order or decree of the Exchequer Court, or of any Superior Court of any Province of Canada.

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The second statute, the Combines and Fair Prices Act, 1919, was directed to the investigation and restriction of combines, monopolies, trusts and mergers, and to the withholding and enhancement of the prices of commodities. By Part I, the Board of Commerce was empowered to prohibit the formation or operation of combines as defined, and, after investigation, was to be able to issue orders to that effect. A person so ordered to cease any act or practice in pursuance of the operations of a combine, was, in the event of failure to obey the order, to be guilty of an in-

dictable offence, and the Board might remit to the Attorney-General of a Province the duty of instituting the appropriate proceedings. By Part II, the necessities of life were to include staple and ordinary articles of food, whether fresh, preserved, or otherwise treated, and clothing and fuel, including the materials from which these were manufactured or made, and such other articles as the Board might prescribe. No person was to accumulate or withhold from sale any necessary of life, beyond an amount reasonably required for the use or consumption of his household, or for the ordinary purposes of his business. Every person who held more, and every person who held a stock-in-trade of any such necessary of life, was to offer the excess amount for sale at reasonable and just prices. This, however, was not to apply to accumulating or withholding by farmers and certain other specified persons. The Board was empowered and directed to inquire into any breach or non-observance of any provision of the Act, and the making of such unfair profits as above referred to, and all such practices with respect to the holding or disposition of necessities of life as, in the opinion of the Board, were calculated to enhance their cost or price. An unfair profit was to be deemed to have been made when the Board, after proper inquiry, so declared. It might call for returns and enter premises and inspect. It might remit what it considered to be offences against this part of the Act to the Attorney-General of the Province, or might declare the guilt of a person concerned, and issue to him orders or prohibitions, for breach of which he should be liable to punishment as for an indictable offence.

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The above summary sufficiently sets out the substance of the two statutes in question for the present purpose.

In the first instance the Board stated, for the opinion of the Supreme Court of Canada, a case in which a number of general constitutional questions were submitted. That Court, however, took the view that the case was defective, inasmuch as it did not contain a statement of concrete facts, out of which such questions arose. Finally, a fresh case was stated containing a statement of the facts in certain matters pending before the Board, and formulating questions that had actually arisen. These related to the action of certain retail clothing dealers in the City of Ottawa. An order was framed by the Board which, after stating the

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facts found, gave directions as to the limits of profit, and a new case was stated which raised the questions already referred to.

In these circumstances the only substantial question which their Lordships have to determine is whether it was within the legislative capacity of the Parliament of Canada to enact the statutes in question.

The second of these statutes, the Combines and Fair Prices Act, enables the Board established by the first statute to restrain and prohibit the formation and operation of such trade combinations for production and distribution in the Provinces of Canada as the Board may consider to be detrimental to the public interest. The Board may also restrict, in the cases of food, clothing and fuel, accumulation of these necessities of life beyond the amount reasonably required, in the case of a private person, for his household, not less than in the case of a trader for his business. The surplus is in such instances to be offered for sale at fair prices. Certain persons only, such as farmers and gardeners, are excepted. Into the prohibited cases the Board has power to inquire searchingly, and to attach what may be criminal consequences to any breach it determines to be improper. An addition of a consequential character is thus made to the criminal law of Canada.

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The first question to be answered is whether the Dominion Parliament could validly enact such a law. Their Lordships observe that the law is not one enacted to meet special conditions in wartime. It was passed in 1919, after peace had been declared, and it is not confined to any temporary purpose, but is to continue without limit in time, and to apply throughout Canada. No doubt the initial words of s. 91 of the British North America Act confer on the Parliament of Canada power to deal with subjects which concern the Dominion generally, provided that they are not withheld from the powers of that Parliament to legislate, by any of the express heads in s. 92, untrammelled by the enumeration of special heads in s. 91. It may well be that the subjects of undue combination and hoarding are matters in which the Dominion has a great practical interest. In special circumstances, such as those of a great war, such an interest might conceivably become of such paramount and overriding importance as to amount to what lies outside the heads in s. 92, and is not covered

by them. The decision in *Russell v. The Queen* (1) appears to recognize this as constitutionally possible, even in time of peace; but it is quite another matter to say that under normal circumstances general Canadian policy can justify interference, on such a scale as the statutes in controversy involve, with the property and civil rights of the inhabitants of the Provinces. It is to the Legislatures of the Provinces that the regulation and restriction of their civil rights have in general been exclusively confided, and as to these the Provincial Legislatures possess quasi-sovereign authority. It can, therefore, be only under necessity in highly exceptional circumstances, such as cannot be assumed to exist in the present case, that the liberty of the inhabitants of the Provinces may be restricted by the Parliament of Canada, and that the Dominion can intervene in the interests of Canada as a whole in questions such as the present one. For, normally, the subject-matter to be dealt with in the case would be one falling within s. 92. Nor do the words in s. 91, the "Regulation of trade and commerce," if taken by themselves, assist the present Dominion contention. It may well be, if the Parliament of Canada had, by reason of an altogether exceptional situation, capacity to interfere, that these words would apply so as to enable that Parliament to oust the exclusive character of the Provincial powers under s. 92.

In the case of Dominion companies their Lordships in deciding the case of *John Deere Plow Co. v. Wharton* (2), expressed the opinion that the language of s. 91, head 2, could have the effect of aiding Dominion powers conferred by the general language of s. 91. But that was because the regulation of the trading of Dominion companies was sought to be invoked only in furtherance of a general power which the Dominion Parliament possessed independently of it. Where there was no such power in that Parliament, as in the case of the Dominion Insurance Act, it was held otherwise, and that the authority of the Dominion Parliament to legislate for the regulation of trade and commerce did not, by itself, enable interference with particular trades in which Canadians would, apart from any right of interference conferred by these words above, be free to engage in the

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(1) (1882) 7 App. Cas. 829.

(2) [1915] A.C. 330, 339, 340.

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Provinces. (1) This result was the outcome of a series of well-known decisions of earlier dates, which are now so familiar that they need not be cited.

For analogous reasons the words of head 27 of s. 91 do not assist the argument for the Dominion. It is one thing to construe the words "the criminal law, except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters," as enabling the Dominion Parliament to exercise exclusive legislative power where the subject matter is one which by its very nature belongs to the domain of criminal jurisprudence. A general law, to take an example, making incest a crime, belongs to this class. It is quite another thing, first to attempt to interfere with a class of subject committed exclusively to the Provincial Legislature, and then to justify this by enacting ancillary provisions, designated as new phases of Dominion criminal law which require a title to so interfere as basis of their application. For analogous reasons their Lordships think that s. 101 of the British North America Act, which enables the Parliament of Canada, notwithstanding anything in the Act, to provide for the establishment of any additional Courts for the better administration of the laws of Canada, cannot be read as enabling that Parliament to trench on Provincial rights, such as the powers over property and civil rights in the Provinces exclusively conferred on their Legislatures. Full significance can be attached to the words in question without reading them as implying such capacity on the part of the Dominion Parliament. It is essential in such cases that the new judicial establishment should be a means to some end competent to the latter.

As their Lordships have already indicated, the jurisdiction attempted to be conferred on the new Board of Commerce appears to them to be *ultra vires* for the reasons now discussed. It implies a claim of title, in the cases of non-traders as well as of traders, to make orders prohibiting the accumulation of certain articles required for every-day life, and the withholding of such articles from sale at prices to be defined by the Board, whenever they exceed the amount of the material which appears to the Board to be required for domestic purposes or for the ordinary purposes of business. The Board is also given jurisdiction to regulate

profits and dealings which may give rise to profit. The power sought to be given to the Board applies to articles produced for his own use by the householder himself, as well as to articles accumulated, not for the market but for the purposes of their own processes of manufacture by manufacturers. The Board is empowered to inquire into individual cases and to deal with them individually, and not merely as the result of applying principles to be laid down as of general application. This would cover such instances as those of coal mines and of local Provincial undertakings for meeting Provincial requirements of social life.

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Legislation setting up a Board of Commerce with such powers appears to their Lordships to be beyond the powers conferred by s. 91. They find confirmation of this view in s. 41 of the Board of Commerce Act, which enables the Dominion Executive to review and alter the decisions of the Board. It has already been observed that circumstances are conceivable, such as those of war or famine, when the peace, order and good Government of the Dominion might be imperilled under conditions so exceptional that they require legislation of a character in reality beyond anything provided for by the enumerated heads in either s. 92 or s. 91 itself. Such a case, if it were to arise would have to be considered closely before the conclusion could properly be reached that it was one which could not be treated as falling under any of the heads enumerated. Still, it is a conceivable case, and although great caution is required in referring to it, even in general terms, it ought not, in the view their Lordships take of the British North America Act, read as a whole, to be excluded from what is possible. For throughout the provisions of that Act there is apparent the recognition that subjects which would normally belong exclusively to a specifically assigned class of subject may, under different circumstances and in another aspect, assume a further significance. Such an aspect may conceivably become of paramount importance, and of dimensions that give rise to other aspects. This is a principle which, although recognized in earlier decisions, such as that of *Russell v. The Queen* (1), both here and in the Courts of Canada, has always been applied with reluctance, and its recognition as relevant can be justified only after scrutiny

(1) 7 App. Cas. 829.

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sufficient to render it clear that the circumstances are abnormal. In the case before them, however important it may seem to the Parliament of Canada that some such policy as that adopted in the two Acts in question should be made general throughout Canada, their Lordships do not find any evidence that the standard of necessity referred to has been reached, or that the attainment of the end sought is practicable, in view of the distribution of legislative powers enacted by the Constitution Act, without the co-operation of the Provincial Legislatures. It may well be that it is within the power of the Dominion Parliament to call, for example, for statistical and other information which may be valuable for guidance in questions affecting Canada as a whole. Such information may be required before any power to regulate trade and commerce can be properly exercised, even where such power is construed in a fashion much narrower than that in which it was sought to interpret it in the argument at the Bar for the Attorney-General for Canada. But even this consideration affords no justification for interpreting the words of s. 91, sub-s. 2, in a fashion which would, as was said in the argument on the other side, make them confer capacity to regulate particular trades and businesses.

For the reasons now given their Lordships are of opinion that the first of the questions brought before them must be answered in the negative. As a consequence the second question does not arise.

They will humbly advise His Majesty to this effect. There should be no costs of these proceedings, either here or in the Supreme Court of Canada.

Solicitors for Attorney-General for Canada: *Charles Russell & Co.*

Solicitors for Attorneys-General for Quebec and Alberta: *Blake & Redden.*

Solicitors for Attorney-General for Ontario: *Freshfields & Leese.*

[PRIVY COUNCIL.]

BURLAND AND ANOTHER.....APPELLANTS;

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ALLEYN AND OTHERS.....APPELLANTS;

AND

BARTHE.....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

*Canada (Quebec)—Legislative Authority of Province—Succession Duty—
Movable Property outside Province—Direct Taxation within Province—
Invalidity of Statute—Pleading—7 Edw. 7 (Queb.), c. 14—4 Geo. 5
(Queb.), cc. 10, 11—British North America Act, 1867 (30 & 31 Vict.
c. 3), s. 92, head 2.*

The Quebec Succession Duty Act (6 Edw. 7, c. 11), as amended by 7 Edw. 7, c. 14, which imposes succession duty in respect of property outside the Province upon the death of the owner domiciled within it, is ultra vires the legislative power of the Province under s. 92, head 2, of the British North America Act, 1867, since the duty imposed is not "direct taxation" having regard to the provisions for its collection.

Cotton v. The King [1914] A.C. 176 discussed and followed.

But, the Quebec Succession Duty Act (4 Geo. 5, c. 10), imposing a duty upon "all transmissions within the Province, owing to the death of a person domiciled therein, of movable property locally situate outside the Province at the time of such death" is intra vires s. 91, head 2, being "direct taxation within the Province."

According to the rules of pleading, an allegation of infirmity in a statute on the ground of ultra vires is sufficient without assigning further reasons. 1922 1 A.C.
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Judgment of the Court of King's Bench reversed, and judgment of the Supreme Court of Canada affirmed.

APPEALS (heard together), the first from a judgment (April 3, 1918) of the Court of King's Bench for the Province of Quebec, affirming a judgment (June 26, 1914) of the Superior Court of that Province; the second, by special leave, from a judgment (February 3, 1920) of the Supreme Court of Canada, reversing a judgment (June 27, 1919) of the Court of King's Bench, and restoring a judgment of the Superior Court.

* *Present*:—VISCOUNT HALDANE, LORD BUCKMASTER, VISCOUNT CAVE, LORD PHILLIMORE, and LORD CARSON.

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The appeals related to statutes of the Province of Quebec imposing succession duty in respect of movable property situate outside the Province upon the death of persons domiciled in the Province.

In the first appeal (*Burland v. The King*) the death occurred in May, 1907, and the duties had been claimed and paid under 6 Edw. 7, c. 11, as amended by 7 Edw. 7, c. 14 (arts. 1191*b, c, g*, of R. S. Q. 1888). The appellants filed a petition of right in September, 1909, alleging that the enactment was ultra vires and seeking to recover a sum consisting in part of duty paid in respect of movable property situate outside the Province, and in part of a higher rate of duty paid upon property within the Province by reason of the duty being imposed upon the entire property. After the hearing by the trial judge the proceedings stood over pending the decision of the Supreme Court in *Rex v. Cotton*. (1) The declaratory Act (4 Geo. 5, c. 10) was passed on February 19, 1914, to overcome the defect in the legislation appearing by the judgment of the Board on appeal in that case(2), but by s. 3 that Act did not apply to "pending cases." The trial judge (Lemieux C.J.) delivered judgment on June 26, 1914, dismissing the petition. That judgment was affirmed on appeal to the King's Bench by a majority (Archambeault C.J., and Lavergne and Carroll JJ.; Pelletier and Cross JJ. dissenting).

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In the second appeal (*Alleyne v. Barthe*) the death had occurred on July 13, 1919. Succession duty in respect of property situate outside the Province was claimed under 4 Geo. 5, c. 10 (arts. 1387*b, g, h*(6.) of R. S. Q., 1909); by s. 2 of the Act it applied to past transmission where the duty was unpaid. The appellants contested the claim, contending that the statute was ultra vires. The trial judge (Lemieux C.J.) held that the Act was intra vires and the duty payable. That judgment was reversed by a majority of the King's Bench, Appeal Side (Cross, Pelletier, and Martin J.J.; Lamothe and Carroll J.J., dissenting). Upon a further appeal to the Supreme Court of Canada that Court (Davies C.J. and Idington, Duff, Anglin and Mignault JJ.) unanimously reversed the judgment of the King's Bench and restored the judgment of the trial judge.

(1) (1912) 45 Can. S.C.R. 469.

(2) [1914] A.C. 176.

The proceedings in the Supreme Court are reported at 60 Can. S. C. R. 1.

The terms of the relevant statutory provisions in both appeals are set out in the judgment of the Judicial Committee.

1921. July 14, 15, 18, 19. *Newcombe K.C.* and *J. W. M. Holmes (Markey K.C. with them)* for the appellants in *Burland v. The King*; *Newcombe K.C.* and *Geoffrey Lawrence (Meredith K.C. and Gravel K.C. with them)* for the appellants in *Alleyn v. Barthe*. In the first appeal the statute under which the duty was paid was ultra vires under the British North America Act, 1867, s. 92, head 2, since the taxation for which it provided was not "direct taxation." On that question the decision of the Board in *Cotton v. The King* (1) is conclusive. The petition of right was a "pending case" within s. 3 of 4 Geo. 5, c. 11; accordingly that Act, which was designed to overcome the objection on which the judgment of the Board proceeded, does not apply. The statute relevant in the second appeal (4 Geo. 5, c. 10) was ultra vires under s. 92, head 2. First, because it was not "direct taxation." By arts. 1387*g* and 1387*h* no title vested in any person until the duty was paid; the result is that the executor or administrator has to pay the duty. Even if the property vests in the executor he is obliged to pay the duties before effect can be given to the will: *Blackwood v. The Queen* (2). Secondly, if the statute does impose the tax now claimed, it is not taxation "within the Province," and is consequently ultra vires under s. 92, head 2. The principle "*mobilia sequuntur personam*" cannot be used to enlarge the Provincial power under that head: *Woodruff v. Att.-Gen. for Ontario* (3); *Rex v. Lovitt*. (4) Although the taxation purported to be imposed upon the transmission, it was in fact imposed upon the property itself. The legislation considered in *Cotton v. The King* (5) also used the word "transmission," but is referred to by the Board as being imposed on the property. But on the true construction of the Act the tax was not payable, because the transmission was not in the Province but where the property was situate. The property was transmitted by the law of the situs, although the Court in situ might adopt the law

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(1) [1914] A.C. 176.

(2) (1882) 8 App. Cas. 82

(3) [1908] A.C. 508.

(4) [1912] A.C. 212.

(5) [1914] A.C. 176, 193.

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of the domicile of the donor. [Reference was also made to *Lambe v. Manuel* (1), *Blackstone v. Miller* (2), and to the definition of "succession" in art. 576 of Civil Code of Lower Canada.]

Sir John Simon K.C. and Lanctot K.C. (St. Laurent K.C. and M. Alexander with them) for the respondents. The taxation was taxation within the Province. The respondents rely upon the reasoning of Duff J. in *Rex v. Cotton* (3), which was not affected by the judgment of the Board on appeal. A sovereign State can impose a duty upon a succession within its territory to movables locally situate outside that territory: *Thomson v. Advocate-General* (4); *Wallace v. Attorney-General* (5); *Colquhoun v. Brooks* (6). That power exists in a colonial legislature: *Harding v. Commissioners of Stamps for Queensland* (7); and was recognized in Quebec before confederation: Civil Code of Lower Canada, arts. 6, 599, 600. The power of the Provinces in this respect was not limited by the British North America Act, 1867, provided that the taxation was direct and for Provincial purposes. That contention is strongly supported by *Lambe v. Manuel*. (1) In *Woodruff's Case* (8) there had been a transfer inter vivos by delivery outside the Province, and the principle applicable to succession did not apply. *Rex v. Lovitt* (9) shows merely that there may be taxation in the Province of the situs for the purpose of legal representation, collection, or administration, in addition to succession duty in the Province of the de cujus. The questions in these appeals are therefore whether the statutes do in fact impose the duties claimed, and if so whether the taxation is direct. In both appeals the statutes under consideration clearly purport to impose the duty upon movables locally situated outside the Province. In the first appeal the petition of right, which owing to its nature cannot be amended, took no point as to the taxation not being direct. The view of the Board in *Cotton v. The King* (10), even if not obiter, does not affect this case. Further, that point not having been raised by the petition, the case was not a "pending case" within s. 3 of 4 Geo. 5,

(1) [1903] A.C. 68, 71, 72.

(2) (1902) 188 U.S. 189.

(3) (1912) 45 Can. S.C.R. 469.
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(4) (1845) 12 Cl. & F. 1.

(5) (1865) L.R. 1 Ch. 1.

(6) [1889] 14 App. Cas. 493, 503.

(7) [1898] A.C. 769.

(8) [1908] A.C. 508.

(9) [1912] A.C. 212.

(10) [1914] A.C. 176.

c. 11, and that statute applied and removed any objection founded on that case. In the second appeal the taxation was direct, since the effect of art. 1387*g* is that nobody but the beneficiary is to be made liable. The statute applies only to "transmissions within the Province."

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Newcombe K.C. in reply. In the first appeal *Cotton v. The King* (1) is conclusive, and in the second *Woodruff's Case* (2) is directly in point. The legislation is invalid as retroactively imposing a condition to succession under the law of the domicile.

Nov. 25. The judgment of their Lordships was delivered by

LORD PHILLIMORE. The British North America Act of 1867, in sections that have been the subject of much criticism and explanation, defined and apportioned as between each Province and the Dominion of Canada, the various powers of taxation that each element of the Constitution was to exercise and enjoy. With regard to the Provinces, the powers were conferred by s. 92 in words which had the appearance of simplicity, and by these exclusive power was given to the Provinces to make laws for "direct taxation within the Province in order to the raising of a revenue for Provincial purposes."

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This power knows no limits save those prescribed in the section, but the endless variety of methods by which taxation can be imposed have from time to time caused the attempted use of this authority to be challenged, and the resulting decisions have not been free from criticism. One of such cases has recently come before the Board for consideration: *Cotton v. The King* (1); and its bearing on the present dispute will be plain when the facts of that case are once more analysed and compared with the circumstances in which the present appeals have arisen.

These appeals are two in number, independent in their history, but both have been heard together before this Board and can be dealt with together in one judgment, although the considerations affecting their decision are not the same.

(1) [1914] A.C. 176.

(2) [1908] A.C. 508.

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George Burland died on May 22, 1907, at and domiciled in Montreal in the Province of Quebec and appointed Jeffrey Hale Burland, the appellants in the appeal No. 102 of 1919, which for convenience will be referred to as the Burland appeal, and William M. Walbank, executors of his will and codicil. The said J. H. Burland was one of the universal legatees under the will, and he made the declaration required by art. 1191*g* (1.) enacted by 6 Edw. 7, c. 11, as to the value of the property owned by the deceased that was situate both within and without the Province. He was accordingly required to pay a sum for succession duty on the whole estate by the deputy collector of Provincial revenue and this amount was paid by the executors under protest.

On September 23, 1909, the executors preferred a petition of right claiming payment back of the duties paid in respect of the properties that were situate outside the Province, and also further sums representing the higher rate at which property within the Province had been taxed by reason of its being aggregated with that outside. The petition was part heard by the Superior Court on July 20, 1911, but it was ordered that the proceedings should be suspended until the decision of the Supreme Court of Canada on the appeal taken from the decision in the case of *Cotton v. The King* (1). The case of *Cotton v. The King* (1) ultimately came before the Board, who, on November 11, 1913, decided against the Crown. Burland's case then came again before the Superior Court on June 26, 1914, when the petition was dismissed, and on appeal to the Court of King's Bench this judgment was affirmed, Cross and Peltier JJ. dissenting from the other judges. The appeal in Burland's case is brought from that decision.

With regard to the other appeal, which will be referred to as Sharple's appeal, it relates to the property of the Hon. J. Sharple, who died on July 30, 1913, also domiciled in Quebec; he appointed the appellant, Dame Margaret Alleyn Sharple, his universal legatee and executrix of his will jointly with the other two appellants.

On October 15, 1913, the executors lodged their declaration, enumerating the property of the deceased, and including therein shares in various companies whose head offices were outside the Province of Quebec. A claim was made

on May 26, 1915, for duties in respect of the whole estate similar to the claim that was made in the case of Burland. These claims, so far as they related to the property outside the Province, were resisted and proceedings were instituted on August 12, 1915, by the respondent as Collector of the Revenue against the executors to recover payment. Lemieux C.J., by whom the action was tried in the Supreme Court, decided against the appellants, who appealed to the Court of King's Bench, and that Court by a majority of three to two decided in the appellants' favour. The respondent then appealed to the Supreme Court of Canada, who on February 3, 1920, unanimously decided against the appellants, and from their judgment this second appeal has been brought.

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In order that the narrative of facts may be perfectly clear, their Lordships have hitherto avoided consideration of the statutes under which the taxes were claimed, and these must now be examined in detail. Though, as will be seen, different considerations apply to the two cases, owing to the difference in the relevant dates, yet the defence of the appellants is in each case identical, and is that the taxing statutes under which the money is claimed are ultra vires of the Provincial government.

So far as the Burland appeal is concerned, the relevant statute is that of 6 Edw. 7, c. 11, amended by 7 Edw. 7, c. 14. Art. 1191b, enacted by s. 1 of the former statute, provides that: "All transmissions, owing to death, of the property in, or the usufruct or enjoyment of, movable and immovable property in the Province, shall be liable to the following taxes calculated upon the value of the property transmitted, after deducting debts and charges existing at the time of the death," and by art. 1191c the word "property" is defined as follows: "The word 'property', within the meaning of this section, shall include all property, whether movable or immovable, actually situate or owing within the Province, whether the deceased at the time of his death had his domicile within or without the Province, or whether the debt is payable within or without the Province, or whether the transmission takes place within or without the Province, and all movables, wherever situate, of persons having their domicile, or residing, in the Province of Quebec at the time of their death."

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By 7 Edw. 7, c. 14, assented to on March 14, 1907, art. 1191*b* was amended by replacing the words "in the province" by the words "as defined in art. 1191*c*."

The first only of these two statutes was applicable in the case of *Cotton v. The King* (1), for Henry Cotton, whose estate was the subject of the dispute, had died on December 26, 1906, domiciled in Montreal, and the question raised was whether or no the property outside the Province was liable to the tax imposed by the statute 6 Edw. 7, c. 11. It was decided that the property was not so liable for two distinct reasons—the one that art. 1191*b*, s. 1, 6 Edw. 7, c. 11, was the real taxing section, and imposed duties upon movable property "In the Province"—the extended meaning given to the word "property" in art. 1191*c*, being held by the Board to be insufficient to bring property outside the Province within the operation of the tax expressly imposed by the earlier section on property within the Province. Had the decision rested only on this ground, it would have provided little help towards reaching a right conclusion in the Burland appeal, as the subsequent statute 7 Edw. 7, c. 14, struck at the root of this part of the decision by deliberately incorporating the definition in the taxing articles. But there was a further and wholly independent ground of decision, and that was that by art. 1191*g*, the tax might be payable in the first instance by a class of persons, who recouped themselves for the payment from the legatees; and, therefore, in accordance with a distinction between direct and indirect taxation traceable to a definition given by John Stuart Mill, and acted upon by the Board in the cases of *Att.-Gen. for Quebec v. Reed* (2); *Bank of Toronto v. Lambe* (3); and *Brewers' and Maltsters' Association of Ontario v. Att.-Gen. for Ontario* (4), the taxation was held to be indirect and outside the power of the Province.

In the course of the judgment of the Board it was stated that the provisions of the statute entitled the collector of inland revenue "to collect the whole of the duties on the estate from the person making the declaration, who may (and, as we understand, in most cases will) be the notary before whom the will is executed and who must recover the

(1) [1914] A.C. 176.

(2) (1884) 10 App. Cas. 141.

(3) (1887) 12 App. Cas. 575.

(4) [1897] A.C. 231

amount so paid from the assets of the estate, or, more accurately, from the person interested therein." Now the statute though mentioning the notary exempts him from obligation to transmit the declaration, and consequently from the liability to pay, which by s. 3 is imposed on the declarant; but it appears from the report that their Lordships were informed that in point of practice the notary frequently did make the declaration himself, and so bring himself within the provisions of the statute. It is now stated that this information was not accurate and that it is not a common practice for the notary to make the declaration, if indeed he ever makes it; and so, the illustration drawn from the case of the notary cannot be taken to have been a reliable one. But the principle remains the same and could equally well have been illustrated by the cases of the executor, or administrator, or legatee by a particular title. The error does not affect the force of the decision, though their Lordships have thought it right to make this explanation, as it has evidently given rise to misunderstanding in the Province.

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Unless, therefore, the case can be distinguished, it completely covers the Burland appeal. The respondent tries to escape down two avenues of reasoning; the one that the point was not necessary for the decision in *Cotton's Case* (1), which had already been determined by other independent considerations, and the other that subsequent legislation made retrospective removes the protection which *Cotton's Case* (2) affords. As to the first, the road is not open. The decision that the statute was ultra vires was in no sense a wayside dictum; it was just as complete and fundamental as the decision that bore on the construction of the statute; the words used in the judgment itself make this clear. After stating the nature of the two questions, it continues in these words (2): "These are the two questions which this Board has to resolve, and though it may well be that the decision of one of these questions in favour of the appellants might render it unnecessary to decide the other, their Lordships are of opinion that they are of co-ordinate importance in the case, and that they should base their judgment equally on the answers to be given to the one and to the other."

(1) [1914] A.C. 176.

(2) Ibid. 187.

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As to the second, the position is less clear. Legislation followed swiftly upon the decision of *Cotton v. The King* (1), and three statutes, 4 Geo. 5, c. 9, 4 Geo. 5, c. 10, and 4 Geo. 5, c. 11, received the Royal assent on February 19, 1914. They will need examination in Sharple's appeal, but so far as the Burland appeal is concerned the critical statute is 4 Geo. 5, c. 11, as in each of the other two statutes there is a provision that, so far as regards property transmitted before the passing of the statute, they only apply where the taxes previously imposed remained unpaid. The statute 4 Geo. 5, c. 11, after reference to the mistake in the case of *Cotton v. The King* (1), and a series of recitals which make it obvious that the purpose of the Act is as far as possible to remedy the provisions of former statutes which had led to the decision and to prevent the inequalities which might arise as between those who had paid and those who had not paid the taxes declared by *Cotton's Case* (1) to be unlawfully imposed, enacted that: "The intent and meaning of all the acts of the Legislature imposing succession duties, was and is, that every person to whom property or any interest therein was transmitted owing to death, should pay to the Government direct, and without having a recourse against any other person, a tax calculated upon the value of the property so transferred": and after a provision to prevent action for recovery of taxes paid on the ground that such taxes were not direct provided by s. 3 that: "This Act shall not apply to pending or decided cases."

The question, therefore, is whether Burland's case was a "pending case" within the meaning of s. 3. Lemieux C.J. regarded the point as closed to the appellants, as they had in fact paid taxes on the property within the Province, and did not ask for their repayment. In his words: "Les pétitionnaires n'ont, en aucune manière, directement ou indirectement, soutenu que la taxe était illégale, parce que cette taxe était indirecte, c.-à-d., contraire à l'acte constitutionnel qui ne permet aux législatures de n'imposer que des taxes directes. Au contraire, la succession Burland admet aussi formellement que possible que la taxe est directe et valable, car elle a payé pour taxes sur les biens dans la province la somme de \$71,522.65 dont elle ne demande pas la répétition," and again: "Si la question de la taxe directe

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n'est pas contestée, mais au contraire admise, le tribunal n'a guère à faire de s'occuper de cette question."

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It is undoubtedly the fact that the appellants in *Burland's* appeal did not raise in express terms the ground of the taxation being indirect and base their relief on this contention, but they stated that the Government had no right to charge taxes on property outside the Province, and that the laws and statutes which authorized the Government to raise such taxes were *ultra vires* and of no effect. This was the exact position in the case of *Cotton v. The King* (1); there also the claim was only for repayment of the taxes on the extra territorial property, and the claim was in similar words, but the fact that the authority to pass the law was challenged, though only associated with a limited relief and a special cause, was regarded as sufficient to compel the Board to consider the question of *ultra vires* in its widest application and not to bind themselves to consider only the one assigned reason of invalidity. According to the rules of pleading, an allegation of infirmity in any statute on the ground of *ultra vires* is sufficient without assigning further reasons.

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Their Lordships cannot, therefore, agree with *Lemieux C.J.* and equally they differ from *Archambeault C.J.* *Lavergne J.* and *Carroll J.* The first of these learned judges bases his judgment, not indeed on the ground of admission of liability, but on that of defect in the pleadings. He says: "La cause actuelle était pendante lorsque la loi a été passée. Comme je le disais dans la cause *Oliver v. Jolin* (2), la loi de 1914 a eu pour objet d'interpréter les lois antérieures sur les taxes de succession, et de déclarer que ces taxes étaient directes et non indirectes. L'article 3 ne doit, en conséquence, s'appliquer qu'aux seules causes où cette question a été expressément soulevée. Dans la cause actuelle, les appelants ont obtenu de la couronne une pétition de droit où la question n'est aucunement invoquée," and *Carroll J.* appears to regard the reservation as inoperative, and no reasons were filed by *Lavergne J.* *Pelletier J.*, who differed, does not deal with the effect of the 1922 1 A.C. statute 4 Geo. 5, c. 11, and *Cross J.*, the other learned judge who dissented, assigned no reasons. p. 227.

(1) [1914] A.C. 176.

(2) (1916) Q.R. 25 K.B. 537.

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Their Lordships think that Burland's case was a pending case within the meaning of s. 3. It was a case in which the claim for repayment was being made and the validity of the statute was in issue.

This being so the case cannot be distinguished from *Cotton v. The King* (1), and the appeal must be allowed, and the judgments of the two Courts below set aside and judgment entered for the appellants with costs here and in those Courts, and they will so humbly advise His Majesty.

Turning now to Sharple's appeal, different considerations and different statutes are involved.

Proceedings there commenced on August 12, 1915, and they were, therefore, not pending when 4 Geo. 5, c. 11, became operative, and it becomes necessary to examine the effect of that and the preceding statutes.

4 Geo. 5, c. 9, provides by art. 1375, that all property movable or immovable, the ownership, usufruct or enjoyment whereof, is transmitted owing to death, shall be liable to certain taxes calculated upon the value of the transmitted property. Art. 1376 says that the word "property" included all property movable or immovable actually situate within the Province, and that whether the deceased was domiciled within or without, or the transmission took place within or without; an exemption was given by art. 1380 to a notary, executor, trustee or administrator from personal liability for the duties imposed. This, as will be seen, does not affect movable property outside the Province, and of course does not touch the property in the present instance; but by 4 Geo. 5, c. 10, it is expressly provided by art. 1387*b* that: "All transmissions within the Province, owing to the death of a person domiciled therein, of movable property locally situate outside the Province at the time of such death, shall be liable to the following taxes calculated upon the value of the property so transmitted, after deducting debts and charges as hereinafter mentioned," and by art. 1387*g*, it is provided that the person to whom as heir, universal legatee, legatee by general or particular title, or donee under a gift in contemplation of death, movable property outside the Province is transmitted, is personally liable for the duties in respect of such properties, and no more; and it concludes: "No notary, executor,

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trustee or administrator shall be personally liable for the duties imposed by this section. Nevertheless the executor, the trustee or the administrator may be required to pay such duties out of the property or money in his possession belonging or owing to the beneficiaries, and if he fails so to do may be sued for the amount thereof, but only in his representative capacity, and any judgment rendered against him in such capacity shall be executed against such property or money only."

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These statutes have effectively met the difficulty which was pointed out in the case of *Cotton v. The King* (1) as to the taxation imposed by the earlier statutes being indirect, and it only remains to be considered whether the taxation is within the Province. For this purpose 4 Geo. 5, c. 10, is the relevant statute. The conditions there stated upon which taxation attaches to property outside the Province are two: (1.) That the transmission must be within the Province; and (2.) That it must be due to the death of a person domiciled within the Province. The first of these conditions can, in their Lordships' opinion, only be satisfied if the person to whom the property is transmitted is as the universal legatee in this case was either domiciled or ordinarily resident within the Province; for in the connection in which the words are found no other meaning can be attached to the words "within the Province" which modify and limit the word "transmission." So regarded the taxation is clearly within the powers of the Province. It is, however, pointed out that art. 1387*g* refers to "every person" to whom movable property outside the Province is transmitted as liable for the duty, but this must refer to every person on whom the duties are imposed, and those persons are, as has already been shown, persons within the Province.

On this construction the statute is clearly within the powers conferred by the British North America Act, 1867, and the taxes in dispute were rightly claimed. Their Lordships, therefore, are of opinion that this appeal should fail, and they will humbly advise His Majesty that it should be dismissed with costs.

Solicitors for appellants: *Holmes, Son, & Pott; Stephenson, Harwood & Tatham.*

Solicitors for respondents: *Charles Russell & Co.*

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April 7.

[PRIVY COUNCIL.]

THE KING.....APPELLANT;

AND

NAT BELL LIQUORS, LIMITED.....RESPONDENTS.

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ON APPEAL FROM THE SUPREME COURT OF CANADA AND
THE SUPREME COURT OF ALBERTA.

Canada—Certiorari—Summary Conviction—Procedure on Certiorari—Inquiry into Evidence—Provincial Legislative Power—Contemporaneous Acts—Liquor Act (Alberta)—Liquor Export Act (Alberta)—Popular Initiative—Direct Representation Act (Alberta)—“Penalty”—British North America Act, 1867 (30 & 31 Vict. c. 3), s. 92—Supreme Court of Canada—Appellate Jurisdiction—Supreme Court Act (R. S. Can., 1906, c. 139), s. 36, as amended by 10 & 11 Geo. 5 (Dom.), c. 32.

A conviction by a magistrate for a non-indictable offence cannot be quashed on certiorari on the ground that the depositions show that there was no evidence to support the conviction, or that the magistrate has misdirected himself in considering the evidence; absence of evidence does not affect the jurisdiction of the magistrate to try the charge. The provisions of the Criminal Code (R. S. Can., 1906, c. 146), the Liquor Act (Alberta), ss. 62, 63, and the Crown Practice Rules (Alberta), whereby the depositions are to be taken down and placed with the record, and to be returned with the conviction on certiorari, do not prevent the application in Canada of the rule above stated.

Review of the English and Canadian authorities as to the procedure on certiorari.

Reg v. Bolton (1841) 1 Q.B. 66 and *Colonial Bank of Australasia v. Willan* (1874) L.R. 5 P.C. 417 approved and followed.

Rez v. Carter (1916) 9 Alb. L.R. 481 approved; *Rez v. Emery* (1916) 10 Alb. L.R. 139 (so far as it related to non-indictable offences), and *Rez v. Hoffman* (1917) 28 Man. R. 7 disapproved.

The Liquor Act (6 Geo. 5, c. 4, Alb.), as amended in 1917 and 1918, is intra vires the legislative power of the Province under the British North America Act, 1867, when read in conjunction with the Liquor Export Act (8 Geo. 5, c. 8, Alb.), whereby rights within the exclusive power of the Dominion are preserved; and it is not ultra vires by reason of being passed pursuant to a popular vote under the Direct Legislation Act (4 Geo. 5, c. 3, Alb.) The provision in s. 80 of the Liquor Act, that liquor kept for sale contrary to s. 23 may be forfeited by a magistrate's order is intra vires, as being for the infliction of a “penalty” within head 15 of the British North America Act, 1867, s. 92. A person can be convicted under s. 23 and his stock of liquor forfeited, although he is carrying on business under the Liquor Export Act.

Judgment of the Supreme Court of Alberta (as to certiorari) reversed.

In s. 36 of the Supreme Court Act (R.S. Can., 1906, c. 139), as amended by 10 & 11 Geo. 5, c. 32 (Dom.), which excepts from the appellate jurisdiction of the Supreme Court of Canada “proceedings for or upon a

* *Present*: LORD BUCKMASTER, LORD ATKINSON, LORD SUMNER, LORD WRENBURY, and LORD CARSON.

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writ of certiorari arising out of a criminal charge," the word "criminal" is used in contradistinction to "civil," and is not limited to the sense in which "criminal" legislation is reserved exclusively to the Dominion Legislature by s. 91 of the British North America Act, 1867. The Supreme Court of Canada therefore has not jurisdiction to hear an appeal from a decision of the Supreme Court of Alberta upon a motion for a writ of certiorari to quash a conviction for unlawfully keeping liquor for sale contrary to s. 23 of the Liquor Act (Alberta).

Judgment of the Supreme Court of Canada affirmed.

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APPEALS by special leave from a judgment of the Supreme Court of Canada (May 10, 1921) dismissing an appeal from a judgment of the Supreme Court of Alberta, Appellate Division (February 12, 1921), for absence of jurisdiction, and from the last-named judgment which affirmed a judgment of Hyndman J.

The respondents were incorporated by Dominion charter in 1917 and did a large business in Edmonton, Alberta, as exporters of liquors; they held a licence under the Liquor Export Act (8 Geo. 5, c. 8, Alb.), as amended, and complied with the requirements of that Act. In 1920 they were convicted before a magistrate at Edmonton "for that they . . . on October 1, 1920, at Edmonton . . . did unlawfully keep a quantity of liquor contrary to the Liquor Act and the amendments thereto." Sect. 23 of the Liquor Act, 1916 (6 Geo. 5, c. 4), as amended to 1920, enacts (subject to immaterial provisos): "No person shall, within the Province of Alberta, by himself, his clerk, servant or agent, expose or keep for sale or directly or indirectly, or upon any pretence or device, sell, barter, or offer to any other person any liquor except as authorized by this Act."

The respondents were convicted upon the evidence of a man employed by the police, who purchased at the respondents' warehouse from their employee twelve bottles of whisky for \$45; they were fined \$200. By a subsequent order made by the magistrate under s. 80 of the Act the whole of the large stock of whisky in the respondents' warehouse at Edmonton was forfeited.

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The respondents moved the Supreme Court of Alberta for a writ of certiorari to quash both the conviction and the order for forfeiture. In accordance with the Crown Practice Rules of the Supreme Court of Alberta, the magistrate forwarded to the Court the conviction and order, the evidence taken at the hearing, and all other papers or documents touching the matter. The motions were heard by

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Hyndman J. who quashed both the conviction and forfeiture order upon a consideration of the evidence. An appeal, by leave, to the Appellate Division was dismissed by Stuart and Beck J. J., Harvey C. J. dissenting. A further appeal to the Supreme Court of Canada was also dismissed, on the ground that the matter was a "criminal cause" within s. 36 of the Supreme Court Act, as amended by 10 and 11 Geo. 5, c. 32, and that consequently the appeal was not competent.

The appeal to the Supreme Court of Alberta, Appellate Division, is reported at 16 Alb. L.R. 149; the grounds upon which the majority of the Court considered that they were entitled to examine the evidence given before the magistrate and to quash the conviction appear (together with the facts and the relevant enactments) from the judgment of the Judicial Committee.

1921. Nov. 21, 22, 24, 25, 28, 29. *S. Woods K.C.* and *Hon. Geoffrey Lawrence* for the appellant.

C. C. McCaul K.C. and *D. N. Pritt* for the respondents.

The arguments sufficiently appear from the judgment of the Judicial Committee. In addition to authorities mentioned in that judgment reference was made on the question of ultra vires to *Canadian Pacific Wine Co. v. Tuley* (1); *Attorney-General of Manitoba v. Manitoba Licence Holders' Association* (2); *Gold Seal, Ltd. v. Dominion Express Co.* (3); 1922 2 A.C. p. 131. *Toronto Ry. Co. v. Toronto City* (4); *Attorney-General for Ontario v. Attorney-General for Dominion* (5); *In re the Initiative and Referendum Act* (6); and on the question of the procedure on certiorari to Short and Mellor's *Crown Office Practice*, 2nd ed., p. 47; Paley on Summary Convictions, 8th ed., pp. 145 et seq.; also (as to the earlier practice) to Bacon's *Abridgment*, tit. "Certiorari" (ed. 1832), vol. ii, p. 16; Burn's *Justice of the Peace*, tit. "Conviction," 30th ed., vol. i., pp. 1150, 1151; and, amongst other cases thereon, *Ex parte Ransley* (7).

April 7. The judgment of their Lordships was delivered by

(1) [1921] 2 A.C. 417.

(2) [1902] A.C. 73.

(3) (1920) 15 Alb. L.R. 377,
389; also 16 Alb. L.R. 113; affd.
62 Can. S.C.R. 424.

(4) [1920] A.C. 426.

(5) [1896] A.C. 348, 360, 371.

(6) [1919] A.C. 935.

(7) (1823) 3 Dow. & Ry. 572.

LORD SUMNER. On October 7, 1920, an information was laid at Edmonton, Alberta, against the respondents, Nat Bell Liquors, Ltd., before a magistrate of that Province, charging them with unlawfully keeping for sale a quantity of liquor contrary to the Liquor Act, that is to say for sale within the Province. The offence, which is created by the Alberta Liquor Act of 1916, s. 23, is one triable by a Court of summary jurisdiction.

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The respondents were convicted and were fined \$200. The conviction, which is in the form provided by the Criminal Code (R. S. Can., 1906, amended to 1920), ran, that Nat Bell Liquors, Ltd., "is convicted . . . for that they, the said Nat Bell Liquors, Limited, on the 1st and 2nd days of October, 1920, at Edmonton, did unlawfully keep for sale a quantity of liquor." The quantity of liquor was the whole of the respondents' stock of whisky in the warehouse in question, though only one case of twelve bottles was actually sold. By a subsequent order, dated November 4, 1920, the magistrate declared the whole of it, and the vessels in which it was contained, to be forfeited to the Crown. Nothing turns on the form of this order.

Thereupon the now respondents moved, by way of certiorari, to quash both orders. In accordance with r. 4 of the Crown Practice Rules of the Supreme Court of Alberta, the magistrate returned the conviction and the order of forfeiture and with them the information and the evidence taken at the hearing in writing, as required by statute. Hyndman J. quashed the convictions, and on appeal his judgment was affirmed by the Supreme Court of Alberta (Harvey C. J. dissenting).

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The appellant then appealed to the Supreme Court of Canada, which dismissed the appeal formally, affirming without reasons given the Registrar's decision that any appeal was incompetent, the proceedings having been "on a criminal charge" within the meaning of the Supreme Court Act. Against this decision an appeal has been taken to their Lordships' Board, but it has become of minor importance, seeing that, by special leave subsequently granted by His Majesty in Council, an appeal has been lodged against the decision of the Supreme Court of Alberta, quashing the conviction and the order for forfeiture, and this is the principal matter now to be decided.

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Both before Hyndman J. and before the Supreme Court of Alberta the evidence was elaborately examined and weighed. The judgments both set out its general effect and frequently quote it in extenso, and it will be convenient, in order to explain what follows, to summarize them.

Nat Bell Liquors, Ltd., were incorporated by Dominion charter in 1917, and did a very large business in Edmonton as exporters of liquor. They held a licence from the Attorney-General of Alberta under the Export Liquor Act and its amendments and complied with the requirements of that Act. The officers of the company in control of the business were Nathan Bell and W. Sugarman. They had a warehouse, fully stocked, from which liquor was despatched for export in accordance with orders received, and their warehouseman, one Angel, was strictly commanded by his superiors to have nothing to do with any local sale or delivery, but to observe carefully all the provisions of the Liquor Act.

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The police determined to test the business actually done by the respondents. They employed for this purpose, as a temporary detective-constable and agent provocateur, a man named Bolsing, who posed as a working carpenter and was provided by the police with a sum of marked money. He was a man who had been convicted some time before of stealing beer, and when cross-examined about it he unsuccessfully denied the conviction. He went to the respondents' warehouse, asked for and saw Angel, and after interviews on three successive days, succeeded in inducing him to sell him for \$45 twelve bottles of whisky, which were given to him and taken away. Either Bell or Sugarman saw him on the premises before the final day, but he was not proved to have then known what he was about. When Bolsing paid the money to Angel, Bell and Sugarman were in another part of the room, though not within earshot, nor did they see the bottles given to him, but he swore that Angel then and there gave the money to them, saying "Here's \$45 more." This they denied, as did a girl typist, who was also present. It was common ground that Angel did sell his employers' whisky and took the money, but the defendants' evidence was that he gave the money to a man named Morris Rosenberg, to keep for him. Bolsing also swore that he was allowed to select the case out of the entire stock, and to buy whichever whisky he liked.

Hyndman J. records the fact that it was not clear whether or not Angel was still in the respondents' employment at the time of the hearing. He was, at any rate, doing work for them at the warehouse after his misconduct had become known, and was not shown to have ever been definitely discharged.

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Of the numerous contentions raised by the respondents, those which logically come first, though not the most fully argued, relate to the validity of the provision as to forfeiture, and indeed of the whole Act, as it stood at the time of the conviction. It appears that the Liquor Act was passed in 1916 under the following circumstances. In the previous year, pursuant to s. 6 of the Direct Legislation Act, an initiative petition was duly presented to the Legislative Assembly of Alberta, praying that a Bill which was identical in all material respects with the Liquor Act should be enacted. Thereupon, as the Act requires, the Bill was presented to the people of Alberta to be voted on, and, having been passed by a considerable majority, was passed by the Legislature without substantial alteration. The respondents contend that the Liquor Act is ultra vires, because, even if it related to matters named in s. 92 of the British North America Act, regarding which a Provincial Legislature is "exclusively" empowered to make laws, still it was not "exclusively" made by the Legislature, but partly also by the people of Alberta. Indeed, the part played in the matter by the Legislature was practically only formal. It was further argued that the Direct Legislation Act was itself ultra vires upon the ground that it altered the scheme of legislation laid down for Canada by the British North America Act, a scheme which vests the Provincial legislative power in a Legislature, consisting of His Majesty, as represented by the Lieutenant-Governor, and of two Houses, or in some Provinces one House, and introduced into it a further and dominant legislative power in the shape of a direct popular vote taken upon a Bill, which the statutory Legislature must pass, whether it really assents to it or not. On the first point it is clear that the word "exclusively" in s. 92 of the British North America Act means exclusively of any other Legislature, and not exclusively of any other volition than that of the Provincial Legislature itself. A law is made by the Provincial Legislature when it has been passed in accordance with the

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regular procedure of the House or Houses, and has received the royal assent duly signified by the Lieutenant-Governor on behalf of His Majesty. Such was the case with the Act in question. It is impossible to say that it was not an Act of the Legislature and it is none the less a statute because it was the statutory duty of the Legislature to pass it. If the deference to the will of the people, which is involved in adopting without material alteration a measure of which the people has approved, were held to prevent it from being a competent Act, it would seem to follow that the Legislature would only be truly competent to legislate either in defiance of the popular will or on subjects upon which the people is either wholly ignorant or wholly indifferent. If the distinction lies in the fact that the will of the people has been ascertained under an Act which enables a single project of law to be voted on in the form of a Bill, instead of under an Act which, by regulating general elections, enables numerous measures to be recommended simultaneously to the electors, it would appear that the Legislature is competent to vote as its members may be pledged to vote individually and in accordance with what is called an electoral "mandate," but is incompetent to vote in accordance with the people's wishes expressed in any other form. Unless the Direct Legislation Act can be shown, as it has not been shown on this occasion, to interfere in some way formally with the discharge of the functions of the Legislature and of its component parts, the Liquor Act, 1916, being in truth an Act duly passed by the Legislature of Alberta and no other, is one which must be enforced, unless its scope and provisions can themselves be shown to be ultra vires. As for the Direct Legislation Act, its competency is not directly raised in the present appeal. What was done in this case was done under the Liquor Act, and if that Act is sustained there is no utility in going behind it to decide the validity of another Act, which merely conditioned the occasion on which the Liquor Act was duly passed.

The Liquor Act, as passed in 1916, contained sections obviously designed to save it from offending against the provisions of the British North America Act. These sections were numbered 27 and 72, and they provided as follows: "27. Nothing herein contained shall prevent any person from having liquor for export sale in his liquor warehouse provided such liquor warehouse and the business

carried on therein complies with requirements in sub-s. 1 hereof mentioned or from selling from such liquor warehouse to persons in other provinces or in foreign countries or to a vendor under this Act. 72. While this Act is intended to prohibit and shall prohibit transactions in liquor which take place wholly within the Province of Alberta except as specially provided by this Act and restrict the consumption of liquor within the limits of the Province of Alberta, it shall not affect and is not intended to affect bona fide transactions in liquor between a person in the Province of Alberta and a person in another Province or in a foreign country, and the provisions of this Act shall be construed accordingly."

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Since then the Liquor Act has been repeatedly amended. In 1917 among other amendments s. 27 was repealed and s. 72 in 1918. Accordingly the Act now reads: "No person shall within the Province of Alberta . . . keep for sale . . . any liquor except as authorized by this Act" (s. 23), and there is nothing in this Act itself, which authorizes a liquor exporting business to be carried on or the keeping of liquor for export to persons in other Provinces or in foreign countries. The question now raised is whether the Act is now within the competence of the Provincial Legislature, containing as it does no disclaimer of any operation affecting such a business, but on the contrary expressly forbidding the keeping of liquor for sale in terms of such generality as would make the prohibition apply to such a business.

In their Lordships' opinion the real question is whether the Legislature has actually interfered with inter-provincial or with foreign trade. The presence or absence of an express disclaimer of any such interference may greatly assist where the language of the Provincial Legislature does not in itself determine the question and define its effect. If, however, it is otherwise clear that there is such an interference, or that there is none, and the language actually used sufficiently decides that question, there is no such sovereign efficacy in such a clause as s. 72 as to make its presence or absence in an enactment crucial. As to the other section repealed in 1918, it is of capital importance to note that on April 13, 1918, the day on which the amending statute, which effected this repeal, received the royal assent, that assent was also given to another statute of the Legislature of Alberta, the Liquor Export Act, which under

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conditions not at the moment material legalized the export of liquor, and authorized liquor to be kept in the Province of Alberta for the purpose of such a trade. In their Lordships' opinion the Liquor Act as amended in 1918 must be taken to authorize by implication that which the Legislature, simultaneously and almost *uno flatu*, authorizes in express terms by another statute directed to that very matter. It is an inconvenient mode of drafting, provocative of doubts and not without considerable peril to the Act in question, to use terms in the Liquor Act which either import a recognition of another Act without any mention of it, or expressly annul while professing to ignore it. The dilemma is this. When the Legislature passed these two Acts, which became law on the same day, did it intend by a simple repeal expressed in the one to stultify all its work expressed in the other, which is what the literal reading of its language leads to, or did it intend to imply the words "or by the Liquor Export Act" after the words "this Act" in s. 23 of the Liquor Act, and so effect a saving exception, which a literal construction of its language clearly negatives? On the principle "*Ut res magis valeat quam pereat*," their Lordships think that in this Act and in these circumstances the latter alternative is the one to be adopted, but they would be loth to apply this precedent in any other than an exactly similar case.

There are some other sections in the Liquor Act, certainly of a stringent character, which the respondents contended to be generally *ultra vires*. Some of these may be dismissed from consideration now as not imperilling the validity of the Act at large and not affecting the particular offence charged and the particular proceedings taken in this case. Such are s. 78, which makes it an offence to publish any letter referring to any intoxicating liquor or giving the name of any person manufacturing intoxicating liquor; s. 79, which authorizes a magistrate to arrest the occupant of any premises on which, under his search warrant, there has been found any liquor unlawfully kept; and s. 80, under which the owner of any liquor may be summoned before a magistrate, whereupon, if it be found to be his liquor, he is to suffer forfeiture of it, unless he shows that he did not intend it to be sold or kept for sale in violation of the Act. Their Lordships do not think that if the Act is otherwise within the competence of the Legislature the

inclusion of any of these provisions, remarkable as they are, makes it ultra vires as a whole. It is not an interference with s. 121 of the British North America Act, for the word "free," applied to admission into a Province, does not further mean that when admitted the article in question can be used in any way its owner chooses, and although this Act, like many other Liquor Acts, has been made increasingly restrictive of individual freedom and enforced by legal measures of progressive severity, its competence depends on its general character and objects and not on the weight with which the Legislature lays its hand on those who violate its statutes. These sections appear to be susceptible of being read and should be read as merely dealing with matters of a local nature in the Province and particularly with the steps by which competent legislation is to be enforced there. One of these provisions, however, is separately challenged. It is that which affects the order forfeiting the respondents' stock of whisky. It is contended that the forfeiture provided in s. 80 is ultra vires, because the powers of the Provincial Legislature are only those given in head 15 of s. 92 of the British North America Act—namely, "the imposition of punishment by fine, penalty or imprisonment for enforcing any law of the Province." It is true that this head does not name a forfeiture, but their Lordships think that it is covered by the word "penalty." The word is not defined in the Act. No doubt the commonest form of penalty is a money penalty, but as that is already dealt with in its most obvious form by the antecedent word "fine," their Lordships are not prepared to put so limited an interpretation on the word "penalty" as would rob the Provincial Legislature of the power, for example, of depriving an illegal vendor of poisons of his stock in trade and would leave it to him ready for further operations on his release from gaol.

The respondents then contended that, if they were within the Liquor Export Act by reason of the business which they carried on, and if they had complied with the provisions and formalities of that Act, they must ipso facto be outside the Liquor Act altogether, so that the presumption arising under that Act from the possession of liquor would not affect them, and the lawfulness of their possession and of their purpose under the Liquor Export Act would, of itself, defeat any charge under the Liquor Act. The

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contention seems to their Lordships to be unfounded and not even easy to understand. Neither Act contains any provision excluding everything, which comes within the purview of the Liquor Export Act, from the operation of the Liquor Act. Presumably full effect must be given to the provisions of both. No doubt what the Liquor Export Act expressly legalises cannot be made an offence under the Liquor Act, for it cannot be supposed that, by similar and simultaneous enactments, the Legislature meant to contradict itself, but beyond this the matter cannot go. It is not necessary to examine the effect which compliance with the Liquor Export Act would have on the presumption raised by the Liquor Act, or to ask whether it would conclusively rebut the presumption or only have the effect of shifting the burden of proof, for these are matters relating to the weighing of evidence and do not arise on certiorari.

Coming to the proceedings taken in this case, it is necessary at the outset to appreciate the general character and scheme of the Liquor Act and its relation to the Canadian Criminal Code. The expression "liquor" as used in the Liquor Act, includes "all fermented spirituous and malt liquors and all liquors which are intoxicating, and any liquor which contains more than $2\frac{1}{2}$ per cent. of proof spirits shall be conclusively deemed to be intoxicating" (s. 2 (c)), and it is important to realize that every one who is in possession of "liquor" is presumably a criminal, and is liable to be sent to gaol (s. 54).

Certain persons, such as chemists and clergymen in respect of liquor kept for dispensing and eucharistic purposes, and certain small quantities of liquor kept in a private house, are exempted from this criminality, and a distinction is made between possession for sale and possession in a private dwelling house, but generally the provisions are as follows:—

"Sect. 23. No person shall within the Province of Alberta by himself, his clerk, servant or agent, expose or keep for sale or directly or indirectly, or upon any pretence or device, sell, barter or offer to any other person any liquor except as authorised by this Act.

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"Sect. 24. No person within the Province of Alberta by himself, his clerk, servant or agent, shall have, keep or give liquor in any place wheresoever other than in the

private dwelling-house in which he resides except as authorized by this Act.

"Sect. 24A. No person within the Province of Alberta shall have or keep in his private dwelling-house a quantity of liquor exceeding one quart of spirituous liquor and two gallons of malt liquor.

"Sect. 54. If in the prosecution of any person charged with committing an offence against any of the provisions of this Act in the selling or keeping for sale or giving or having or purchasing or receiving of liquor, prima facie proof is given that such person had in his possession or charge or control any liquor in respect of or concerning which he is being prosecuted, such person shall be obliged to prove that he did not commit the offence with which he is so charged."

At the hearing of the summons the Attorney-General does not appear to have taken full advantage of the statutory presumption, contained in s. 54, for, instead of simply proving that Nat Bell Liquors, Ltd., had in their possession the liquors to which the charge referred, and leaving it to them to rebut the presumption of guilt thereon arising, he went into the case from the outset, as if the ordinary burden of proof rested on the prosecution. Probably this was the more convenient course under the circumstances of the case, but the result may be that, if the question whether there was evidence to convict can be raised at all, the time, at which it arose, was the conclusion of the case for the Crown, and that the statutory presumption should not be regarded as making good defects, if otherwise established, in a prosecution in which the Crown had voluntarily undertaken the affirmative. At any rate, the effect of s. 54 is made less of by the learned judges than might perhaps have been expected, and, after the course which the case has taken, it would be unsatisfactory to dispose of the matter by simply saying that the Court did not accept the defendants' evidence on an issue upon which the burden of proof lay upon them. It will be convenient to state at the outset that none of the ordinary grounds for certiorari, such as informality disclosed on the face of the proceedings, or want of qualification in the justices who acted, are to be found in the present case. The charge was one which was triable in the Court which dealt with it, and the magistrate who heard it was qualified to do so.

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There is no suggestion that he was biased or interested, or that any fraud was practised upon him. His conduct during the proceedings is unimpeached, and nothing occurred to oust his initial jurisdiction after the commencement of the inquiry. No conditions precedent to the exercise of his jurisdiction were unfulfilled, and the conviction, as it stood, was on its face correct, sufficient and complete.

In the superior Courts the proceedings in the Court below were kept throughout in the forefront of the case, sometimes in the form of asking what evidence the Court was entitled to consider, sometimes in the form of considering its sufficiency and effect. The real question, though it might present itself as one of evidence, was one of the jurisdiction of the superior Court on certiorari. Hyndman J. cited from *Rex v. Covert* (1) a series of rules which, rightly or wrongly, purport to lay down the conditions under which alone a judge of fact can refuse to accept, that is to say, to believe evidence given before him, and, after elaborately examining the evidence, concludes by saying: "Looking at the whole case I am of opinion that the evidence of the defence meets, as squarely and satisfactorily as can reasonably be expected, the presumption raised against the defendants by the evidence for the Crown, and that it fulfils the requirements set forth in the judgment in *Rex v. Covert* (1) and that consequently the magistrate should have accepted such denials and explanations."

On appeal Stuart J., while declining to discuss *Rex v. Covert* (1), said: "After reading the reasons the justice gave for convicting" (which were neither part of the formal conviction nor part of the depositions), "I cannot discover that he kept in mind, as he should have kept in mind, his duty to receive a spy's evidence with caution, or that he even remembered the untruths in the spy's evidence to which I have referred. . . It was so easy for Bolsing to add the one circumstance to his story" (that was his statement about "\$45 more") "which was necessary to make his work as a detective successful, that this quite evident failure on the part of the magistrate would be almost, if not quite, sufficient of itself in my opinion to justify the quashing of the conviction. . . If the use of the little word 'more' by

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Bolsing is adverted to, I must reply that that is too slight a cord upon which to hang anything, and in addition to the interest of the witness using the expression, and the obvious advantage of adding it, even the word itself is open to other interpretations. If I had been engaged with a jury on the trial of this case, I should undoubtedly have withdrawn it from their consideration on this latter ground at least."

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Thereafter Beck J., after laying down as a principle "that the Court has the right and the duty, in the exercise of its inherent plenary jurisdiction in supervising the proceedings of inferior tribunals, to examine the entire proceedings certified to it, and to deal finally with the case according to right and justice," proceeded to examine the statements of the witnesses, dwelt on the fact that Bolsing was an accessory and was uncorroborated, and said: "Had the charge been one not of keeping for sale but even for the lesser offence of selling, it seems clear to me that, had the case been before a judge and a jury, the judge ought to have withdrawn the case from the jury, or at the very least to have pointed out to the jury the danger of convicting upon such evidence, in view of the presumption of innocence, and the necessity for excluding all reasonable doubt, and in the event of a verdict of guilty to have given leave to appeal on the weight of evidence . . . in which event the verdict would have been undoubtedly set aside."

It appears to their Lordships that, whether consciously or not, these learned judges were in fact rehearing the whole case by way of appeal on the evidence contained in the depositions, a thing which neither under the Liquor Act nor under the general law of certiorari was it competent to them to do. As, however, the majority in the Supreme Court proceeded on a view of certiorari, which purported to justify this mode of dealing with the evidence, their Lordships will consider the case in that light without disposing of it as a case of entertaining an appeal, where no appeal lay.

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The reasons, expressed or implied, which in the view of the learned judges warranted the Court in quashing this conviction appear to have been the following: (1.) Without Bolsing there was no evidence of the commission of the offence by the accused company, and his evidence was no evidence, since he was an accessory before the fact and was uncorroborated; (2.) it was not evidence on which

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a jury could safely convict, and ought therefore to be treated as no evidence at all; (3.) want of evidence or of sufficient evidence makes the conviction one pronounced without jurisdiction; (4.) such want of jurisdiction can be established by evidence dehors what is set out on or forms part of the record of the conviction; (5.) in any case, by the statute law of Alberta the depositions are part of the record, or can be examined on certiorari as if they were part of the record; and finally, (6.) in Alberta, at any rate in connection with cases arising under the Liquor Act, the superior Court can do more than could be done on certiorari by the High Court of Justice in England, and can, as matter of law, review the whole proceedings to see that justice has been done.

Their Lordships think that of these contentions the first and second may be shortly disposed of. They have not been referred to any decisive authority which applies to certiorari the same considerations as apply to testing a jury's verdict, when challenged on a motion for a new trial or on an appeal; nor, apart from a few expressions, here and there, not very carefully considered, can any judicial dicta be found to support it. Whether the verdict was one which twelve reasonable men could have found, whether the evidence was such that twelve reasonable men could find on it otherwise than in one way, whether the evidence was such that a jury could safely convict upon it, and whether it was such that a Court of criminal appeal should refuse to interfere with the conviction, are questions which, though fully argued, have no relation to the functions of a superior Court on certiorari. They all imply that there was evidence, but not much; they all ask whether that little evidence was enough; they are all applied to a body of men who are not the absolute judges of fact, but only judges whose decision may, though rarely, be disturbed. On certiorari, so far as the presence or absence of evidence becomes material, the question can at most be whether any evidence at all was given on the essential point referred to. Its weight is entirely for the inferior Court: "If indeed there had been any evidence whatever, however slight, to establish this point," said Lord Kenyon in *Rex v. Smith* (1), "and the magistrate who convicted the defendant had drawn his conclusion from that evidence, we would not have

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examined the propriety of his conclusion; for the magistrate is the sole judge of the weight of the evidence. And for this reason I think there is no foundation for the first objection. . . There was some evidence from which he might draw the conclusion."

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The majority in the Supreme Court of Alberta appear to have accepted this principle, but to have thought that it might be met by inquiring whether the justices had misdirected themselves as to the law of evidence, under which term they sought to include a failure to give sufficient or any weight to features in the evidence which appeared to them to be of preponderating importance. It may well be that error as to the law of evidence, like any other error of law, if it is apparent on the record, is ground for quashing the order made below, but none of the objections taken here show that the magistrate acted under any misapprehension of the law. Their Lordships, beyond pointing out the fact, will not stay to consider that the charge was a charge of keeping the liquor for an unlawful purpose, to which Bolsing was not an accessory, and not one of selling it, to which he was. Assuming that Bolsing was an accessory, still he was a competent witness. If he impressed the justice as a witness of truth, no error in law was committed in believing him even without corroboration, but only an error of judgment. Corroboration, however, there was in fact on the point about the money so much adverted to, for, as Hyndman J. points out (though he fails to see the significance of it), Angel, who on the case for the defence had disobeyed his orders in the most serious way and had disposed of his masters' whisky for his own profit, was still at the time of the hearing acting as their employee, a circumstance tending to show that what he had done was not really a piece of flagrant disobedience and roguery but a thing within the scope of his duties, though unfortunately unsuccessful. The weight of this was for the magistrate, and was, if he so chose to regard it, some corroboration of Bolsing's tale.

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Passing from considerations of the weight of the evidence, we come to the questions whether there was any evidence, and what materials are to be looked at in order to answer that question, and further what effect a decision that on some essential point evidence was completely lacking would have on the jurisdiction respectively of the magistrates

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and the superior Court. In the different Provinces of Canada there has, from time to time, been much diversity of view as to the powers and duties of the superior Court on certiorari. Though the principles laid down in *Reg. v. Bolton* (1) and the *Colonial Bank of Australasia v. Willan* (2) have been accepted in Ontario, the attempt to distinguish them, as Stuart and Beck JJ. distinguished them in the present case, was made at any rate as long ago as 1883: *Reg. v. Wallace* (3), per Cameron, J., dissentientem. The Courts of Ontario have considered themselves free and even bound, under the legislation applicable, to examine the evidence returned by the inferior Court and to inquire whether the justices had before them any evidence of an offence, such as was within their jurisdiction, though they have uniformly purported to recognize that the weight and credibility of it, when given, were entirely for the justices. There has been considerable diversity in the language used. Sometimes the question has been whether there was "any sufficient evidence of the offence": *Reg. v. Wallace* (3); sometimes whether there was "any evidence of an offence": *Reg. v. Coulson*, No. 1 (4), and *Reg. v. Coulson*, No. 2 (5); sometimes whether there was "reasonable" evidence to support the conviction: *Rex v. Borin* (6); but the general view has been that, if there is some evidence, there is jurisdiction to hear and determine, and thereafter the superior Court will not interfere: *Rex v. Reinhardt* (7); *Rex v. Cantin* (8); *Rex v. Thompson*. (9) The Courts of New Brunswick and Nova Scotia have decided that want of evidence is not a ground for quashing a conviction, and in *Hawes v. Hart* (10) and *Reg. v. Walsh* (11), the authorities are collected.

In Manitoba, Saskatchewan and Alberta a different view has asserted itself, though not without much difference of opinion. In *Rex v. Pudwell* (12), Hyndman J. adopted the regular view of *Willan's Case* (2), and refused to quash a conviction, where the charge was within the jurisdiction and the proceedings were regular on the face of them.

(1) 1 Q.B. 66.

(2) L.R. 5 P.C. 417.

(3) (1883) 4 Ont. R. 127, 141.

(4) (1893) 24 Ont. R. 246.

(5) (1896) 27 Ont. R. 59.

(6) (1913) 29 Ont. L.R. 584.

(7) (1917) 11 Ont. W.N. 346.

(8) (1917) *Ibid.* 435.

(9) (1917) 39 Ont. L.R. 108.

(10) (1885) 18 Nov. Scot. R. 42.

(11) (1897) 29 Nov. Scot. R. 521.

(12) (1916) 10 West. W.R. 205.

Later on in 1916, in the case of *Rex v. Carter* (1) Harvey C. J. laid it down, after a full and careful examination of the authorities, that, if a conviction is valid on its face, absence of evidence to support a conviction is not a ground for quashing it, but in the main two decisions, *Rex v. Emery* (2) in Alberta, and *Rex v. Hoffman* (3) in Manitoba, have caused the view to prevail in those Provinces and in Saskatchewan which was applied in the present appeal, and has also been followed in Quebec: *Lacasse v. Fortier*. (4) The practical effect of those decisions is that not only is the superior Court not precluded from examining the evidence given in the Court below or confined to ascertaining, as a point going to the jurisdiction of the magistrate, whether he had before him some evidence supporting his conviction, but it is free to range over the whole evidence and to subject it to criticism. This conclusion is arrived at by holding that legislation which requires that depositions shall be taken in writing, and a rule which requires them to be transmitted with the conviction on making a return to an order for certiorari, in effect make them part of the record for all purposes. This of course is a question of particular statutory practice and not of the general law. The decisions, however, go on to hold that, although in general the credibility and weight of the evidence is for the magistrate, the Superior Court can, as a matter of law, consider whether he guided himself by a right view of the credibility of particular evidence, and it is plain that a practice to review the whole of the depositions, however the purpose of it is expressed, leads very easily to the conclusion that a conviction may be quashed, not so much because no witness has sworn to the particular facts required to make out a case for the prosecution, as because, on balancing it against the evidence given for the defendant, the great preponderance is thought to be on his side. This practice of examining the evidence, though of many years' standing before the present case, has been stated in the Manitoba and Alberta decisions as having objects which vary considerably. The Court would not quash, it has been said, if there was evidence to go to a jury: *Reg. v. Grannis* (5). There must be evidence which the Court

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(1) (1916) 9 Alb. L.R. 481.

(2) (1916) 10 Alb. L.R. 139.

(3) (1917) 28 Man. R. 7.

(4) (1917) 30 Can. Crim. Cas.
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(5) (1887) 5 Man. R. 153.

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can see may reasonably support the conviction. Whatever the Court of Queen's Bench, upon an inspection of the proceedings, would deem sufficient to be left to a jury on a trial is, when set out on the face of a conviction, adequate to sustain it: *Reg. v. Davidson*. (1) The Court can only quash if there is a complete absence of any evidence whatever of the commission of the offence: *Reg. v. Herrell*. (2) The Court examines the evidence to ascertain, not whether the tribunal reached the proper conclusion on the evidence, but whether there was any evidence upon which the tribunal could properly find as it did: *Rex v. Emery*. (3)

In the present case Stuart J. says of the position occupied by the magistrate: "He was not merely standing in the place of a jury. He was also a judge, with the duty of applying in his own mind sound legal principles in the consideration and the weighing of evidence. . . . It is not acting at all on appeal on the facts to say that the magistrate misdirected himself in his duty as a judicial officer in failing to take into account the true character of the evidence of the prosecution on a crucial point. Particularly is this so when the magistrate knew that his decision against the accused was without appeal and would have tremendous consequences with respect to property, while a decision the other way would be subject to review at the instance of the prosecution by two appeals. . . . What I have said has no relation whatever to the questions discussed in *Rex v. Covert*." (4)

Beck J. states the matter with equal breadth, though in a somewhat different way: "This Appellate Division held in *Rex v. Emery* (3), that the Court is entitled upon certiorari—at least in cases where certiorari is not taken away—to look at the evidence given before the convicting magistrate, to ascertain whether or not it is sufficient to sustain the conviction, and if it is not, to quash the conviction. . . . This view seems now to be that adopted in all the Provinces of Canada. . . . I take occasion to endeavour to make clearer why the latter-day English decisions are of no authority upon this question, which, as I have said, seems at the present day to have become settled throughout Canada beyond reversal. . . . The right and duty, therefore,

(1) (1892) 8 Man. R. 325.

(2) (1898) 12 Man. R. 198.

(3) 10 Alb. L.R. 139.

(4) 10 Alb. L.R. 349.

of this Court to consider the evidence upon which a conviction is made, and if it is found to be insufficient, to quash the conviction, is then at least equal to the right and duty of the Court to set aside a verdict in a criminal case upon a case reserved, if it appears that the evidence is insufficient to support the conviction. The cases, therefore, in which upon a reserved case the Court has set aside a conviction for insufficiency of evidence, are therefore authorities applicable to cases arising on certiorari. . . . but, as I shall endeavour to show, the power of the Court to set aside a conviction on certiorari is much greater than its power upon a reserved case."

Rex v. Emery (1) was a case to which both Stuart and Beck JJ. had been parties, and, in a measure, the present case may be said to be an appeal against it. In argument, however, it has been pointed out that *Rex v. Emery* (1) was a case of summary trial of an indictable offence, whereas the present is a case of the determination by a Court of summary jurisdiction of an offence cognizable only by such a Court. In what their Lordships have to say of *Rex v. Emery* (1) they wish to keep open this distinction, if it be one, for consideration, if a case of an indictable offence should hereafter come before them, but, in so far as both cases are on all fours, *Emery's Case* must be examined.

The proposition adopted may be stated thus: in exercising its inherent jurisdiction to supervise the proceedings of an inferior Court, the Superior Court must inquire whether there was any evidence on which the tribunal below could have decided as it did decide, and this involves examining the evidence given to see if it was sufficient in this sense to sustain the conviction. If, on some part of the case, which was material to the charge and had to be legitimately established before the accused person could be convicted, no evidence was forthcoming at all, this would be error of law, which being duly brought to the notice of the superior Court would oblige it to quash the conviction. For this reliance was placed on *Rex v. Smith* (2); *Rex v. Crisp* (3); and *Rex v. Chandler* (4); *Ex parte Vaughan* (5); and *Lovesy v. Stallard* (6).

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(1) 10 Alb. L.R. 139.

(2) 8 T.R. 588.

(3) (1806) 7 East, 389.

(4) (1811) 14 East, 267.

(5) (1866) L.R. 2 Q.B. 114.

(6) (1874) 30 L.T. 792.

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It is evident that this exact point must be one of rare occurrence. It assumes complete jurisdiction, complete absence of any testimony on a definite and essential point, and complete presentation to the superior Court of this omission in the Court below. Only if the whole evidence given can be got before the superior Court can this difficulty be raised. Only when it appears that no witness whatever has said a thing that must be said by some one will it fall to be discussed. It will have two aspects: the first, whether the omission from the record of any statement that the necessary piece of evidence was given raises the presumption, that it must nevertheless have been given or the justices would not have convicted, or the presumption that, as it was not stated, it cannot have been given at all, or whether, at any rate, it shows that the record is in need of further and fuller statement; and the second, whether pronouncing a conviction, notwithstanding such an absence of necessary proof, is an error of law or a mistake in fact. More generally speaking, it becomes necessary to ask, what is the "record" and when can the superior Court go outside of it, and, if want of evidence can be established, does that establish want of jurisdiction in the magistrate?

When justices were required to set out the evidence on the record of the conviction, as nearly as might be in the terms in which it was given, detection of a hiatus on the record would justify a mandamus to them, to complete the record by setting out the evidence on the point. In taking this course in *Rex v. Warnford* (1), Abbott C.J. says: "The conviction must set out the language used by the witness, in order that it may be seen whether a right conclusion is drawn from it. The Court will not assume that the justice has done his duty unless he tells us so by his own acts." On the other hand, if legislation has provided for a shorthand note of the whole of the evidence and for its attachment to the conviction as a part of it, when returned on certiorari, the record itself shows, when it reaches the superior Court, whether or no the evidence in question was given. It seems to have been by no means settled on authority that, even when the evidence eventually reaches the Court in a complete form, the Court should criticize the absence of the material evidence as error in law, and as ground for quashing

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the conviction. In *Ex parte Vaughan* (1), Shee J., alone of the judges who expressed opinions, dealt with the case of there being no evidence at all on which justices could adjudicate, but all he says is that then "they would be acting improperly." Lord Coleridge in *Lovesy v. Stallard* (2) says generally that "the existence of evidence is for the Court." On the other hand, in *Rex v. Galway Justices* (3), Palles, C.B. points out that a conviction which sets out no evidence cannot be questioned as to the evidence given before the justices on material dehors the conviction. In *Reg. v. Cheshire Justices* (4), it actually appeared on the affidavits filed on the question of the justices' jurisdiction, that, in making their order, they had acted on a view of the facts not testified to at all, but merely stated to them by one of their own body as being within his knowledge. The Court of Queen's Bench nevertheless, having decided that there was jurisdiction, declined to interfere. Though one member of the Court said that the justices had decided "absurdly", they refused to criticize the decision further. "This," said Lord Denman, "we cannot look into."

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It has been said that the matter may be regarded as a question of jurisdiction, and that a justice who convicts without evidence is acting without jurisdiction to do so. Accordingly, want of essential evidence, if ascertained somehow, is on the same footing as want of qualification in the magistrate, and goes to the question of his right to enter on the case at all. Want of evidence on which to convict is the same as want of jurisdiction to take evidence at all. This, clearly, is erroneous. A justice who convicts without evidence is doing something that he ought not to do, but he is doing it as a judge, and if his jurisdiction to entertain the charge is not open to impeachment, his subsequent error, however grave, is a wrong exercise of a jurisdiction which he has, and not a usurpation of a jurisdiction which he has not. How a magistrate, who has acted within his jurisdiction up to the point at which the missing evidence should have been, but was not, given, can, thereafter, be said by a kind of relation back to have had no jurisdiction over the charge at all, it is hard to see. It cannot be said that his conviction is void, and may be disregarded as a nullity, or that the whole proceeding was coram non iudice. To say that there

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(1) L.R. 2 Q.B. 114, 118.

(2) 30 L.T. 792, 794.

(3) [1906] 2 I.R. 446.

(4) (1838) 8 Ad. & E. 398, 403.

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is no jurisdiction to convict without evidence is the same thing as saying that there is jurisdiction if the decision is right, and none if it is wrong; or that jurisdiction at the outset of a case continues so long as the decision stands, but that, if it is set aside, the real conclusion is that there never was any jurisdiction at all. This appears from the very full and able discussion of all the authorities in *Rex v. Mahony*. (1) On this point *Ex parte Hopwood* (2) may also be referred to. In that case certiorari having been taken away by statute, the Court could only interfere if the justices had convicted without having any jurisdiction at all. It was alleged on affidavit that, on the particular summons in question, they had had no evidence before them, even of the service of the summons. The Court held that, even so, the fact did not take away jurisdiction. "As to the want of evidence on matter of fact," says Patteson J., "that cannot possibly take away jurisdiction; no case can be cited where that has ever been said." (3) To the same effect is *In re Shropshire Justices*. (4) Furthermore a conviction, regular on its face, is conclusive of all the facts stated in it, not excepting those necessary to give the justices jurisdiction, and it is from the facts stated in the conviction that the facts of the case are to be collected. Thus, in the well-known case of *Brittain v. Kinnaid* (5), the plaintiff had been convicted under the Bumboat Act, and the conviction stated his offence in terms of the Act simply, "for that he had unlawfully in his possession in a certain boat certain stores," very much as the conviction runs in this case. He said that his vessel was of 13 tons burthen and was not a boat, and sued the justice; but it was held that the conviction was conclusive evidence that a boat it was, and no distinction is drawn which would limit the conclusive character of the conviction as an answer to civil proceedings in trespass taken against the magistrate.

In *Reg. v. Bolton* (6) Lord Denman, in a well-known passage, says: "The case to be supposed is one . . . in which the Legislature has trusted the original, it may be (as here) the final, jurisdiction on the merits to the magistrates below; in which this Court has no jurisdiction as to the merits either originally or on appeal. All that we can

(1) [1910] 2 I.R. 695.

(2) (1850) 15 Q.B. 121.

(3) (1850) 15 Q.B. 128.

(4) (1866) 14 L.T. 598.

(5) (1819) 1 Brod. & B. 432.

(6) 1 Q.B. 66, 72 *et seq.*

then do is to see that the case was one within their jurisdiction, and that their proceedings on the face of them are regular and according to law. . . . Where the charge laid before the magistrate, as stated in the information, does not amount in law to the offence over which the statute gives him jurisdiction, his finding the party guilty by his conviction in the very terms of the statute would not avail to give him jurisdiction; the conviction would be bad on the face of the proceedings, all being returned before us. Or if, the charge being really insufficient, he had misstated it in drawing up the proceedings, so that they would appear to be regular, it would be clearly competent to the defendant to show to us by affidavits what the real charge was, and, that appearing to have been insufficient, we should quash the conviction. . . . But, as in this latest case we cannot get at the want of jurisdiction but by affidavits, of necessity we must receive them. It will be observed, however, that here we receive them, not to show that the magistrate has come to a wrong conclusion, but that he never ought to have begun the inquiry. . . . But where a charge has been well laid before a magistrate, on its face bringing itself within his jurisdiction, he is bound to commence the inquiry: in so doing he undoubtedly acts within his jurisdiction: but in the course of the inquiry, evidence being offered for and against the charge, the proper, or it may be the irresistible, conclusion to be drawn may be that the offence has not been committed, and so that the case in one sense was not within the jurisdiction. Now to receive affidavits for the purpose of showing this is clearly in effect to show that the magistrate's decision was wrong if he affirms the charge, and not to show that he acted without jurisdiction. . . . The question of jurisdiction does not depend on the truth or falsehood of the charge, but upon its nature; it is determinable on the commencement, not at the conclusion, of the inquiry: and affidavits, to be receivable, must be directed to what appears at the former stage, and not to the facts disclosed in the progress of the inquiry."

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The law laid down in *Reg. v. Bolton* (1) has never since been seriously disputed in England. In *Colonial Bank of Australasia v. Willan* (2) the Judicial Committee settled that the same rules are applicable to the Dominions, except in

(1) 1 Q.B. 66.

(2) L.R. 5 P.C. 417.

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so far as they may be affected by competent legislation. The respondents must, therefore, distinguish these authorities, since, where they apply, it is not now possible to argue that they were not rightly decided, or else they must show special legislation applicable in Alberta. *Willan's Case* (1) is said to be distinguishable on two grounds, first, that it was not, nor was *Bolton's Case* (2), a criminal case; and, secondly, because Sir James Colville's language shows the decision to have turned on the Committee's being satisfied, from the evidence before it, that the material allegations had been proved by evidence given in the Court below. If so, both cases were merely decisions on the admissibility upon certiorari of fresh affidavit evidence to impugn or to confirm the regularity of the proceedings below, as returned to the superior Court.

There is no reason to suppose that, if there were any difference in the rules as to the examination of the evidence below on certiorari before a superior Court, it would be a difference in favour of examining it in criminal matters, when it would not be examined in civil matters, but, truly speaking, the whole theory of certiorari shows that no such difference exists. The object is to examine the proceedings in the inferior Court to see whether its order has been made within its jurisdiction. If that is the whole object, there can be no difference for this purpose between civil orders and criminal convictions, except in so far as differences in the form of the record of the inferior Court's determination or in the statute law relating to the matter may give an opportunity for detecting error on the record in one case, which in another would not have been apparent to the superior Court, and therefore would not have been available as a reason for quashing the proceedings. In this connection, reliance was placed on a passage in the opinion of Lord Cairns in *Walsall Overseers v. London and North Western Ry. Co.* (3). The question for decision there was simply whether or not the Court of Appeal had jurisdiction to entertain an appeal from an order of the Court of Queen's Bench, discharging a rule nisi for a certiorari to quash an order of Quarter Sessions in a rating matter. Lord Cairns, speaking of certiorari generally, said: "If there was upon the face of the order of the Court of Quarter Sessions anything

(1) L.R. 5 P.C. 417.

(2) 1 Q.B. 66.

(3) (1878) 4 App. Cas. 30, 39.

which showed that that order was erroneous, the Court of Queen's Bench might be asked to have the order brought into it, and to look at the order, and view it upon the face of it, and if the Court found error upon the face of it, to put an end to its existence by quashing it." He then turned to the kind of order under discussion, and after stating how much in that matter, both of fact and of law, the Sessions were bound to set out on the face of their order, he proceeded to point out that the statement of what had led to the decision of the Court made the order "not an unspeaking or unintelligible order," but a speaking one, and an order which on certiorari could be criticized as one which told its own story, and which for error could accordingly be quashed.

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It is to be observed on this passage, that the key of the question is the amount of material stated or to be stated on the record returned and brought into the superior Court. If justices state more than they are bound to state, it may, so to speak, be used against them, and out of their own mouths they may be condemned, but there is no suggestion that, apart from questions of jurisdiction, a party may state further matters to the Court, either by new affidavits or by producing anything that is not on or part of the record. So strictly has this been acted on, that documents returned by the inferior Court along with its record, for example, the information, have been excluded by the superior Court from its consideration. That the superior Court should be bound by the record is inherent in the nature of the case. Its jurisdiction is to see that the inferior Court has not exceeded its own, and for that very reason it is bound not to interfere in what has been done within that jurisdiction, for in so doing it would itself, in turn, transgress the limits within which its own jurisdiction of supervision, not of review, is confined. That supervision goes to two points: one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise.

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The view taken in the Supreme Court of Alberta of the real grounds for the decision in the *Colonial Bank of Australasia v. Willan* (1) proceeds on a complete misapprehension. In that case Sir James Colville said of the order, which had

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been wrongly quashed: "The order, then, was one made by a competent judge; showing, on the face of it, that every requirement of the statute under which it was made had been complied with; . . . and containing an express adjudication upon a fact which, though essential to the order, the judge was both competent and bound to decide—viz., that the sum claimed to be due to the petitioning creditors was then due to them from the mining company. Nor can it be said that there was no evidence to support this finding, since the affidavit filed in support of the petition distinctly swears to the debt. This being so, it seems to follow that the Supreme Court could only arrive at the opposite conclusion upon a retrial of the question of the petitioning creditors' debt, and that upon evidence which was not before the inferior Court." (1)

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Commenting on this passage Beck J., in *Rex v. Emery* (2), expresses the opinion that what the Judicial Committee condemned and all that it condemned, was a retrial of the existence of the debt by the superior Court on fresh evidence, which had not been adduced below; and in *Rex v. Hoffman* (3), which adopted the reasoning and conclusions of *Rex v. Emery* (2) in the following year, it is said that all that was decided in *Willan's Case* (4) was the question of the admissibility of fresh evidence by affidavit in the superior Court, which had not been before the justices in the Court below. All this seems to have hung on Sir James Colville's commencement of a new paragraph and a new step in the reasoning with the words "this being so." This was taken not as comprehending all that had preceded, but as relating solely to the sentence beginning "Nor can it be said that there was no evidence" The report shows that no such point was taken by Mr. Benjamin for the respondents. His argument was that the proceedings were heard ex parte, for the company did not appear on the winding-up petition; but that the winding-up judge had assumed the preliminary question—namely, whether or not there was a creditor before the Court—to have been conceded in consequence of the absence of controversy; that in the result he had established his jurisdiction by proceeding upon an assumed fact; and that the reality of that assumption having been inquired into in the superior Court on affidavit as to

(1) L.R. 5 P.C. 446.

(2) 10 Alb. L.R. 139.

(3) 28 Man. R. 7.

(4) L.R. 5 P.C. 417.

the fact, since questions going to the jurisdiction of the Court below must in case of need be inquired into, and it having been found that in fact no petitioning creditor existed, the order was rightly quashed. (1) The passage above relied on is the answer to this argument, which is briefly dismissed at the end of the main conclusion by recalling that the judge had uncontradicted affidavit evidence of the existence of the debt before him, and found and recited the existence of the debt, and in doing so was examining into the reality of an alleged fact, which it was within his competence to decide, although, had the alleged fact been found to be untrue, he would have been bound to dismiss the petition to wind up the company.

This misapprehension of the meaning of the Judicial Committee's opinion is probably due to the not infrequent confusion between facts essential to the existence of jurisdiction in the inferior Court which it is within the competence of that Court to inquire into and to determine, and facts essential thereto which are only within the competence of the superior Court. As Lord Esher points out in *Reg. v. Income Tax Commissioners* (2), if a statute says that a tribunal shall have jurisdiction if certain facts exist, the tribunal has jurisdiction to inquire into the existence of these facts as well as into the questions to be heard; but while its decision is final, if jurisdiction is established, the decision that its jurisdiction is established is open to examination on certiorari by a superior Court. On the other hand, the fact on which the presence or absence of jurisdiction turns may itself be one which can only be determined as part of the general inquiry into the charge which is being heard. The following is a real instance of this. In an anonymous case reported in 1 B. & Ad. 382, justices who had jurisdiction to hear a charge of common assault were precluded by statute from exercising it, if the evidence disclosed that the assault was accompanied by an attempt at felony. Although such an attempt was deposed to in the course of the evidence supporting the charge of assault, a rule to quash a conviction for a common assault was discharged upon the ground, that it was for the justices to decide whether they believed the part of the evidence which disclosed the attempt, and if they did not their jurisdiction to convict was not ousted by the statute. In the language

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(1) L.R. 5 P.C. 443, 444.

(2) (1888) 21 Q.B.D. 313, 319.

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of Coleridge J., delivering the judgment of the Court in *Bunbury v. Fuller* (1), the rule is thus stated: "No Court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limit to its jurisdiction depends; and however its decision may be final on all particulars, making up together that subject-matter which, if true, is within its jurisdiction, and, however necessary in many cases it may be for it to make a preliminary inquiry, whether some collateral matter be or be not within the limits, yet, upon this preliminary question, its decision must always be open to inquiry in the superior Court."

In addition, however, to this mistaken attempt to place the decisions in *Reg. v. Bolton* (2) and in *Willan's Case* (3) on a too limited ground the majority of the Supreme Court of Alberta acted on a view of the English legislation of 1848, which without foundation is deemed to differentiate the law of certiorari in England and in Canada.

The learned judges appear to have thought that the application of these cases depends on the effect in England of the Summary Jurisdiction Act of 1848 (11 & 12 Vict. c. 43); that the law applicable in Canada is the law as it was in England before 1848, and not the law as it had stood ever since, and that under the earlier law the superior Court on certiorari was entitled to examine generally into the evidence on which the conviction was pronounced on the pretext of inquiring whether the conviction was within the jurisdiction of the justices. Their Lordships think that there has been a mistake on both points.

Reg. v. Bolton (2), undoubtedly, is a landmark in the history of certiorari, for it summarizes in an impeccable form the principles of its application under the regime created by what are called Jervis's Acts, but it did not change, nor did those Acts change the general law. When the Summary Jurisdiction Act provided, as the sufficient record of all summary convictions, a common form, which did not include any statement of the evidence for the conviction, it did not stint the jurisdiction of the Queen's Bench, or alter the actual law of certiorari. What it did was to disarm its exercise. The effect was not to make that

(1) (1853) 9 Ex. 111, 140.

(2) 1 Q.B. 66.

(3) L.R. 5 P.C. 417.

which had been error, error no longer, but to remove nearly all opportunity for its detection. The face of the record "spoke" no longer: it was the inscrutable face of a sphinx.

Long before Jervis's Acts statutes had been passed which created an inferior Court, and declared its decisions to be "final" and "without appeal," and again and again the Court of King's Bench had held that language of this kind did not restrict or take away the right of the Court to bring the proceedings before itself by certiorari. There is no need to regard this as a conflict between the Court and Parliament; on the contrary, the latter, by continuing to use the same language in subsequent enactments, accepted this interpretation, which is now clearly established and is applicable to Canadian legislation, both Dominion and Provincial, when regulating the rights of certiorari and of appeal in similar terms. The Summary Jurisdiction Act, 1848, was intended to produce and did produce its result by a simple change in procedure without unduly ousting the supervisory jurisdiction of the superior Court.

The matter has often been discussed as if the true point was one relating to the admissibility of evidence, and the question has seemed to be whether or not affidavits and new testimony were admissible in the superior Court. This is really an accidental aspect of the subject. Where it is contended that there are grounds for holding that a decision has been given without jurisdiction, this can only be made apparent on new evidence brought ad hoc before the superior Court. How is it ever to appear within the four corners of the record that the members of the inferior Court were unqualified, or were biased, or were interested in the subject matter? On the other hand, to show error in the conclusion of the Court below by adducing fresh evidence in the superior Court is not even to review the decision: it is to retry the case. If the superior Court confines itself to what appears on the face of the record, evidently the more there is set out on the record the more chance there is that error, if there was error, will appear and be detected. The Summary Jurisdiction Act cut down the contents of the record, and so did away with a host of discussions as to error apparent on its face. The superior Court acquired no new and more extensive right to admit fresh evidence by affidavit or to contradict the record of the conviction by matter de hors its contents. When it would previously have been

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confined to matter appearing on the face of the record, it continued to be so confined, but the grounds for quashing on certiorari came in practice to be grounds relating to competence and disqualification.

It follows that there is not one law of certiorari before 1848 and another after it, nor one law of certiorari for England and another for Canada. The real questions are: (1.) has any statute, having force in Alberta, prescribed a form of conviction which omits all evidence from the record and leaves nothing but the statement that the accused was duly convicted to take its place; and (2.) has any other such statute modified the practical effect of that provision, which, of course, must otherwise be the same for Canada as for England?

The Legislatures of Canada have not failed to profit by the experience of England in framing new or amending statutes directed to the removal of difficulties in the administration of the law, which arose out of common law rules and forms no longer adapted to the purposes of the day. Even before the British North America Act was passed, legislation had been enacted in Canada prescribing a general form of conviction for offences within the competence of a summary jurisdiction. That form was in substance the form prescribed in the English Act of 1848, the form now in force under the Criminal Code of Canada, and the form in which the conviction in the present case was expressed. Special Canadian legislation has long dealt with the subject of temperance and restricted or prohibited the sale of intoxicants, and Alberta, too, has for many years enacted strict measures of her own, the present Liquor Act being the last result of much amendment and reamendment of the earlier steps taken in that direction. All this has been done with the history of certiorari and of the effect of prescribing a general form for conviction present to the mind of the Legislature concerned, and the enactments so passed must be read in the light of these general provisions. If so, no marked difference can be found between the systems under which in England and in Canada summary jurisdiction is applied to offences against liquor laws, and it follows *prima facie* that Canadian legislation, affecting summary convictions and the powers of superior Courts to quash them upon certiorari, is to be construed, in accordance with the older English decisions, as limiting the jurisdiction by way of

certiorari only where explicit language is used for that purpose, and, on the other hand, as contenting itself with an indirect limitation on the exercise of that jurisdiction, by substituting for the detailed record of a century and more ago the "unspeaking" form of a general conviction such as was prescribed in 1848. Of course, it is competent for the Legislature to go further than this, and, where the language used shows such an intention, the presumption above stated is negatived. This may be done notably in two ways. The one is to take away certiorari explicitly and unmistakably, or to limit it in a manner not within the older decisions upon such words as "final" or "without appeal"; the other is, on the other hand, to restore it to its pristine rigour by restoring to the record a full statement of the evidence. In the present case it is argued that both methods have been employed in Alberta. The record, it is said, is made to contain the whole of the evidence and on certiorari the superior Court is directed to examine it. Three enactments are relied upon as differentiating the present case from the "latter-day" English cases. They are (1.) ss. 682, 683, 721, 793, 1017 and 1124 of the Canadian Criminal Code. The first two require that the evidence given before justices shall be taken down in the form of written depositions; s. 793 binds the magistrate to transmit the depositions with other papers to the clerk of the peace to be placed among the records of the general sessions of the peace; s. 1017 only refers to appeals and applications for new trials; s. 1124 is to the like effect; it uses practically the same terms as s. 62 of the Liquor Act, hereinafter quoted, and is re-enacted from 55 & 56 Vict. c. 29, s. 889; (2.) the provision in the Crown rules, which requires depositions to be returned with the conviction on certiorari; and (3.) ss. 62 and 63 of the Liquor Act, which are relied on as specific legislation, directing what is to be done with those depositions in the superior Court on certiorari to bring up a conviction under the Liquor Act.

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Their Lordships think it reasonably plain that no great reliance can be placed on any but the last of these provisions. To say that there would be no use in written depositions, if they were not to be available for use in a superior Court on certiorari, is to beg the question. Till the hearing is concluded, and the decision is pronounced, it cannot be known whether or not an appeal may be taken in appealable

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cases, but, if it is to be taken to good purpose, the depositions must have been put into permanent form while the evidence is being given. Even where there is no appeal, the process of taking down what the witnesses say, as they say it, tends to care both on the part of the witnesses and of the Court, and makes it all the more possible to ensure that no conviction will be pronounced unless evidence has been given of each essential feature of the charge. Either of these considerations provides an abundant satisfaction for the sections, which require the evidence to be taken down, and it is unnecessary to speculate further as to their possible admissibility in the particular case of certiorari. Again, r. 4 of the Crown Practice Rules only requires that the evidence shall be returned with the conviction, and it refers to the depositions as separate papers or documents. Since the statute expressly provides that the record of the conviction may be sufficiently recorded in the statutory form, a mere general rule of practice is not to be read as altering that provision or as requiring that the record of it shall include a separate document sent along with it, that is to say, virtually, as declaring that the general form of conviction shall not be in itself a sufficient record, the statute notwithstanding.

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Sects. 62 and 63 of the Liquor Act are headed "Convictions and Subsequent Proceedings," and are as follows: "62. No conviction order or warrant for enforcing the same or other process shall upon any application by way of certiorari or for a habeas corpus or upon any appeal be held insufficient or invalid for any irregularity, informality or insufficiency therein, or by reason of any defect of form or substance therein, if the Court or judge hearing the application or appeal is satisfied by a perusal of the depositions that there is evidence on which the justice might reasonably conclude that an offence against a provision of this Act has been committed. 63. The Court or judge hearing any such application of appeal may upon being satisfied as aforesaid, confirm, reverse or modify the decision, which is the subject of the application or appeal, or may amend the conviction or other process or may make such other conviction or order in the matter as he thinks just."

Here, no doubt, there is an express definition of the relation of depositions to certiorari, which excludes any implied relation such as has been referred to above. The

depositions are not made part of the record. They are used as independent materials, upon which the judge must uphold a conviction, which upon its face he might otherwise be bound to quash for irregularity, informality or insufficiency, provided that he is satisfied within the terms of the section. It seems to have been thought in the Court below that, if the depositions could be looked at for one purpose on certiorari, they could be looked at for another, and that, as it is expressly provided that they are materials available for affirming an otherwise dubious conviction, they must also, by necessary implication, be materials available for quashing a conviction, which on its face appears to be beyond doubt. This is not so. Plainly, the object of the section is to stop every chance of the accused's escaping after conviction, so far as it is possible to do so; but it contains no word in his favour. The only wonder is that it does not provide for certiorari to bring up and quash an order dismissing the information.

The next section (s. 63) does, it is true, contain the word "reverse," but on examination it is clear that this is not a reversal that is to benefit the accused. The Court, upon being satisfied as aforesaid, that is, in the words of s. 62, being: "satisfied by a perusal of the depositions that there is evidence on which the justice might reasonably conclude that an offence against a provision of this Act has been committed, . . . may confirm, reverse or modify, . . . 1922 2 A.C. . . or may amend the conviction or make another conviction." p. 165.

The condition of power to reverse, in the sense of a power to let the guilty person off, cannot be a conclusion from evidence that the Act has been violated, and it is to be noted that the word is "reverse" and not "quash." What evidently is meant is that, on drawing the above conclusion from the evidence, the Court may, if it thinks fit to exercise the power of making some other conviction, reverse for that purpose the conviction actually made below, which otherwise would stand in the way, and direct the conviction, which in its opinion the justices should have pronounced.

Their Lordships are of opinion that the provisions of the Canadian Criminal Code and of the Alberta Liquor Act have not the effect of undoing the consequences of the enactment of a general form of conviction; that the evidence, thus forming no part of the record, is not available material

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on which the superior Court can enter on an examination of the proceedings below for the purpose of quashing the conviction, the jurisdiction of the magistrate having been once established, and that it is not competent to the superior Court, under the guise of examining whether such jurisdiction was established, to consider whether or not some evidence was forthcoming before the magistrate of every fact which had to be sworn to in order to render a conviction a right exercise of his jurisdiction.

The magistrate's order for the forfeiture of the entire stock of whisky in cases stands or falls by the same considerations as the conviction for keeping it unlawfully, though in itself it constituted by far the severest penalty. The learned judges below were not unnaturally impressed by the fact, that one reason for selecting as the offence to be charged an unlawful keeping instead of an unlawful selling, was to get the opportunity, after establishing the offence, of applying for the forfeiture of the stock of whisky. This, however, makes no difference to the legal aspect of the matter. There was also some irregularity in the issue of the search warrant, which preceded the application for forfeiture, and in the information on which it was applied for, but this does not afford a ground for quashing the order, if otherwise it is not impeachable. It is urged that there was no evidence which would justify the forfeiture, since proof of the unlawful sale of one case is no evidence of an unlawful keeping of the entire stock of cases, thousands in number. This, of course, is only another way of contending that there was no evidence of the commission of the principal offence. Even if the superior Court was entitled to investigate the nature and extent of the evidence, as to which the considerations already advanced need not be repeated, their Lordships are of opinion that this matter was one for the magistrate. If he believed the evidence as to the circumstances under which the whisky sold was inquired for, selected, sold and taken away, it cannot be said that his conclusion, that the whole stock and not the single case only was unlawfully kept, exceeded the provisions of the Liquor Act.

As leave was given for the appeal from the judgment of the Supreme Court of Alberta, upon which all the questions that arise can be completely disposed of, it became unnecessary, for the purpose of this case, to proceed with the appeal from the refusal of the Supreme Court of Canada to enter-

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tain the matter, and their Lordships might well have declined to entertain it. They have, however, been asked to give a decision on this point also, in order that a question of law, which it is suggested is at least doubtful, may be set at rest. On this ground, and not as opening the door in future to any general admission of argument upon points which do not necessarily arise, their Lordships are content to deal with it. The question is whether an appeal from the Supreme Court of Alberta in this case to the Supreme Court of Canada would have been a criminal cause or matter within the words of the Dominion statute (10 & 11 Geo. 5, c. 32). This Act, which received the Royal Assent shortly before the commencement of the proceedings now in question, excepted by s. 36 from the appellate jurisdiction of the Supreme Court of Canada, "proceedings for or upon a writ of certiorari arising out of a criminal charge." In substance and for present purposes this was the law as laid down in the Supreme Court Act, ss. 35, 36 and 39, and the alterations made in 1920 are not now material.

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The question whether a prosecution under a typical Temperance Act is or is not a criminal charge has twice been before the Supreme Court in recent years—namely, *In re McNutt* (1), which was a case of habeas corpus, and *Mitchell v. Tracey* (2), which was a case of prohibition. In the first, six judges took part in the hearing. Three of them held that the application for the writ arose "out of a criminal charge"; one held that it did not, and one seriously doubted whether it did; the remaining judge expressed no opinion on the point. The case was, however, capable of being disposed of on other grounds. Duff J. delivered an elaborate and striking judgment, to the effect that the application for the writ did not arise out of a criminal charge, and the principal judgment contra was that of Anglin J. In the second case, out of five judges who took part, three followed the conclusion of Anglin J. in the earlier case, Anglin J. himself being one, and two expressed no opinion on the point at all. Under these circumstances it becomes desirable to examine the question more fully than would otherwise be required, in view of the fact that the present case has been substantially disposed of on the appeal from the Supreme Court of Alberta.

(1) (1912) 47 Can. S.C.R. 259.

(2) (1919) 58 Can. S.C.R. 640.

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The issue is really this. Ought the word "criminal" in the section in question to be limited to the sense in which "criminal" legislation is exclusively reserved to the Dominion Legislature by the British North America Act, s. 91, or does it include that power of enforcing other legislation by the imposition of penalties, including imprisonment, which it has been held that s. 92 authorizes Provincial Legislatures to exercise? It may also be asked (though this question is not precisely identical) under which category does this conviction fall of the two referred to by Bowen L.J., in *Osborne v. Milman* (1), when he contrasts the cases "where an act is prohibited, in the sense that it is rendered criminal," and "where the statute merely affixes certain consequences, more or less unpleasant, to the doing of the act."

Their Lordships are of opinion that the word "criminal" in the section and in the context in question is used in contradistinction to "civil," and "connotes a proceeding which is not civil in its character." Certiorari and prohibition are matters of procedure, and all the procedural incidents of this charge are the same whether or not it was one falling exclusively within the legislative competence of the Dominion Legislature, under s. 91, head 27. When the Supreme Court was established by statute in 1875, and this exception out of its powers as to habeas corpus was enacted by ss. 23 and 51, there was then in existence a substantial body of undoubtedly criminal matters, which did not rest on any statute, and this must have been within the purview of these sections, the British North America Act notwithstanding. After all, the Supreme Court Act is concerned not with the authority, which is the source of the "criminal" law under which the proceedings are taken, but with the proceedings themselves, and all the arguments in favour of limiting appeals in such cases apply with equal force, whether the Provincial Legislature is or not the competent legislative authority.

Their Lordships will therefore humbly advise His Majesty that on the appeal from the judgment of the Supreme Court of Alberta the appeal should be allowed; that the judgments of the Supreme Court and of Hyndman J. should be set aside, and that the conviction and order for forfeiture

should be restored, and the appeal from the Supreme Court of Canada should be dismissed. Their Lordships were given to understand that an arrangement has been made between the parties which makes any direction as to costs unnecessary on the present occasion.

Solicitors for appellant: *Blake & Redden.*

Solicitors for respondents: *Lawrence Jones & Co.*

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[AND CROSS APPEAL.]

ON APPEAL FROM THE SUPREME COURT OF ONTARIO,
APPELLATE DIVISION

Canada—Legislative Power of Dominion—Emergency Legislation—Property and Civil Rights in Provinces—Control of Paper Supply and Prices—Canadian War Measures Act (5 Geo. 5, c. 2, Dom.)—9 & 10 Geo. 5, c. 63, Dom.—British North America Act, 1867 (30 & 31 Vict. c. 3), ss. 91, 92.

1923 A.C. Under ss. 91 and 92 of the British North America Act, 1867, the Dominion
p. 696. Parliament has an implied power, for the safety of the Dominion as a whole, to deal with a sufficiently great emergency, such as that arising from war, although in so doing it trenches upon property and civil rights in the Provinces, from which subjects it is excluded in normal circumstances. The enumeration in s. 92 is not repealed in such an emergency, but a new aspect of the business of Government emerges. The Dominion Government, which in its Parliament represents the people of Canada as a whole, must be deemed to be left with considerable freedom to judge whether a sufficiently great emergency exists to justify an exercise of the power:—

Held, accordingly, that the Canadian War Measures Act, 1914, and Orders in Council made thereunder during the war for controlling throughout Canada the supply of newsprint paper by manufacturers and its price, also a Dominion Act passed after the cessation of hostilities for continuing the control until the proclamation of peace, with power to conclude matters then pending, were *intra vires*.

Judgment of the Appellate Division affirmed on a different ground.

APPEAL AND CROSS-APPEAL (No. 69 of 1923) from a judgment of the Supreme Court of Ontario, Appellate Division (May 8, 1922), affirming a judgment of Riddell J. (March 24, 1922).

The main question in the appeal was whether the Canadian War Measures Act, 1914 (5 Geo. 5, c. 2, Dom.), and certain Orders in Council made thereunder during the war for the control throughout Canada of the supply of

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newsprint paper by manufacturers and its price, also a further Dominion statute (9 & 10 Geo. 5, c. 63), passed after the cessation of hostilities, for continuing that control until the proclamation of peace, were intra vires the Dominion Parliament.

The facts of the case, in which the respondents were plaintiffs and the appellants defendants, are stated in the judgment of the Judicial Committee, from which the provisions of the statutes in question sufficiently appear.

The trial judge (Riddell J.) held that the statutes and Orders were intra vires under s. 91, head 2 ("regulation of trade and commerce"), and gave judgment for the plaintiffs.

On appeal to the Appellate Division (see 42 Ont. L. R. 118) that judgment was affirmed on the ground that as a matter of contract between the parties the prices finally paid were binding; the Court consequently did not find it necessary to determine whether the Acts and orders were intra vires.

1923. June 22, 25, 26. *Clauson K.C. and Cattanach K.C.* for the appellants. The legislation and Orders were ultra vires under the British North America Act, 1867. The Acts clearly trenched upon property and civil rights in the Provinces (s. 92, head 13), and consequently cannot be justified under the general words at the beginning of s. 91 unless they deal with one of the matters enumerated in that section: *Attorney-General for Canada v. Attorney-General for Alberta*. (1) The only enumerations in s. 91 which it can be suggested apply are head 2, "the regulation of trade and commerce," and head 7, " . . . defence." The Acts and Orders went beyond regulation in that they compelled the appellants to supply at lower prices than they could get elsewhere; therefore, they do not fall within s. 92, head 2: *Citizens' Insurance Co. v. Parsons* (2); *Russell v. The Queen* (3); *The Prohibition Case* (4); *John Deere Plow Co. v. Wharton* (5); *Attorney-General for Canada v. Attorney-General for Alberta* (6); *Board of Commerce Case*. (7) Even if the Act of 1914 can be justified as "defence" (s. 92, head 7), the respondents' claim rests on the Order of 1920, which

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(1) [1916] 1 A.C. 588, 595.

(2) (1881) 7 App. Cas. 96.

(3) (1882) 7 App. Cas. 829.

(4) [1896] A.C. 348

(5) [1915] A.C. 330.

(6) [1916] 1 A.C. 588.

(7) [1922] 1 A.C. 191, 197.

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can be justified only under the Act of 1919. That Act was passed after the armistice; the Order was made after the Governor-Genreal had declared by Order in Council that "war conditions had long ago ceased to exist." In those circumstances the last cited case is directly applicable to the Act of 1919. Even if s. 6 of the Act of 1914 was valid the Orders went beyond its scope, and the material Order—namely, that of 1920—was invalid under the Act of 1914 in that it was made after the cessation of the war. The ground upon which the Appellate Division decided was not raised by the respondents' pleading; the material before the Court did not establish a contract. The appellants on their counter-claim and cross-appeal are entitled to the sum by which the market price of the paper supplied exceeded the controlled prices paid.

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[VISCOUNT HALDANE referred to *Hamilton v. Kentucky Distilleries Co.* (1); reference was also made on the question of "defence" to *Attorney-General v. De Keyser's Royal Hotel* (2); *Robinson & Co. v. The King* (3); and *Attorney-General v. Wilts United Dairies.* (4)]

Tilly K.C. for the respondents. Having regard to the special circumstances existing in 1914 the Act of that year and the Orders were valid. The paper mills were scattered through the Provinces, and there were newspaper publishers in all the Provinces. The control of the trade, which the evidence shows was necessary, could only be effected by Dominion legislation. Control of prices was a necessary part of the control of the trade. Sects. 91 and 92 must be read so as to enable legislation necessary in existing circumstances to be passed by the Dominion if it cannot be passed effectively by the Provinces. The *Board of Commerce Case* (5) recognizes that exceptional circumstances, such as those arising from war, may take a subject out of the enumeration in s. 92 and into the general words of s. 91. The Act of 1919 was passed by the Dominion to wind up transactions arising under emergency legislation which it had validly passed. Even if the Orders were invalid, the Appellate Division rightly held that the appellants were bound by contract. They submitted to the jurisdiction of the tribunal, and applied to it for increases of prices.

(1) (1919) 251 U.S. 146.
(2) [1920] A.C. 508, 529.
(3) [1921] 3 K.B. 183, 197.

(4) (1922) 127 L.T. 822.
(5) [1922] 1 A.C. 191, 197.

Clauson K.C. replied.

July 25. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. This appeal raises questions of some novelty and delicacy.

The appellants are manufacturers of newsprint paper in Ontario, and the respondents are publishers of newspapers, carrying on business at various places in Canada. The action out of which the appeal arises was brought by the respondents against the appellants to recover sums the former had paid for paper delivered to them at controlled prices. These sums, which the respondents alleged to represent margins in excess of the prices regulated by law, they claimed to be repayable to them as the result of orders of the Paper Control Tribunal of Canada, the final order having been made on July 8, 1920. The sums represented the amounts due after an adjustment of accounts in accordance with the above-mentioned final order and previous orders which it modified. For the balance so arrived at the action was brought in the Supreme Court of Ontario. It was tried before Riddell J., who gave judgment for the plaintiffs, the respondents.

No question was raised as to figures, and the learned judge treated the question before him as being only whether the Paper Control Tribunal and the Paper Controller, from whose orders the Paper Control Tribunal was in effect a Court of Appeal, had been validly vested with power to make the orders in controversy. The judgment of Riddell J. was made the subject of an appeal to the Appellate Division of the Supreme Court, which affirmed the judgment of the trial judge. There was a counterclaim by the appellants for the amount of the market prices of the paper delivered by them to the respondents, less the sums actually paid. This was dismissed by Riddell J., the dismissal being consequential on his view that the Orders were valid. The Court of Appeal did not think it necessary to go into this question of validity, for they considered that notwithstanding that pressure was put on the appellants to supply the paper at the prices fixed by the Orders, they did send out invoices and supply it, and thereby in effect entered into contracts for such supply on the terms that the prices were provisional and to be finally adjusted in

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terms of the Orders to be made by the Paper Control Tribunal. On that footing nothing was, in the event, due on the counterclaim. Whether the action of these tribunals was legal or not, the appellate Court therefore held that the appellants, notwithstanding that they had acted under pressure, had bound themselves to accept the prices fixed and were liable.

Their Lordships have not been able to satisfy themselves that this view was a reliable one. The tribunals exercised control not only over prices but over the supply of the paper itself, and were in a position to exercise, and did exercise, pressure which was practically irresistible. There is evidence of its character in the present case, and the appellants contend that if the case is to be decided on the footing on which it was decided by the appellate Court—a footing which would be material only on the hypothesis that the Orders were invalid—it should be sent back for a new trial. Their Lordships think that this contention cannot be lightly overruled. But if the Orders were not invalid but valid, and the tribunals really possessed the powers they claimed to exercise, the question does not arise. It is therefore necessary to consider in the first place the validity of the legislation and Orders in Council by which the controlling tribunals were set up and invested with the powers exercised.

Purporting to act under the provisions of the War Measures Act passed by the Parliament of the Dominion in August, 1914, the Governor-General made an Order in Council, dated April 16, 1917, authorizing the Minister of Customs to fix the quantity and price of newsprint paper in sheets or rolls furnished or to be furnished to those who required it for publishing. The Order was to be operative from March 1, 1917, to June 1 in the same year. By further Orders this power was extended to December 1 in that year. Acting in accordance with these Orders the Minister ordered deliveries and fixed prices, and this procedure continued until Mr. R. A. Pringle K.C. was, by Order in Council dated November 3, 1917, appointed Controller as well as Commissioner, with power to fix the quantities to be delivered and the prices, such prices, however, to be approved by the Governor-General in Council.

By various Orders Mr. Pringle fixed prices for a period extending from July 1, 1918, to December 1 in that year.

By Order in Council dated September 16, 1918, prices were directed no longer to be supervised by the Governor in Council, inasmuch as a new tribunal called the Paper Control Tribunal was set up, and a right of appeal to it from any Order of the Controller was given. The Paper Control Tribunal made various Orders on appeals from the Controller, and on July 8, 1920, made an Order fixing a price for a period ending on December 31, 1919, and directing the appellants to refund all sums received in excess of the prices fixed. It was the amount of the excess that was the subject of the present action.

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On the construction and validity of these Orders points have been made in argument, but the most general question to be decided is definitely raised by the appellants, and is whether the Orders in Council, the statutory basis on which they rest, and the proceedings founded on them by the Controller and the Paper Control Tribunal, were *intra vires* of the Dominion executive and Legislature.

So far as the relevant legislation of the Parliament of the Dominion is concerned, this consists of two statutes. The first of these is the War Measures Act, 1914. It enacts that the provisions of s. 6 (to be presently referred to) are only to be in force during war, invasion or insurrection, real or apprehended. The issue of a Government proclamation is to be conclusive evidence that these exist and are continuing, until the issue of a subsequent proclamation declaring them to exist no longer. War is to be deemed to have existed since August 4, 1914. By s. 6 the Governor in Council is to have power to do and authorize such acts and things and to make such orders and regulations as he may, by reason of the existence of real or apprehended war, invasion or insurrection, deem necessary or advisable for the security, defence, peace, order and welfare of Canada. These powers are to extend, among other matters, to trading, exportation, importation, production, manufacture, and also to appropriation, control, forfeiture, and disposition of property and of its use.

By a later Act of the Dominion Parliament, passed on July 7, 1919, relating to paper control, after referring to certain of the Orders in Council already mentioned and to the War Measures Act of 1914, on the recital that there had been investigations and work begun by the Paper Commissioner and Controller which were not completed, and with

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respect to which appeals would lie to the Paper Control Tribunal, and that there were then matters pending before and undetermined by that tribunal, it was enacted that the powers, jurisdiction and authority of the Commissioner and Controller of Paper were confirmed and extended so as to enable him to complete all work and investigations begun by him prior to the declaration of peace, and to determine all questions and to make all necessary Orders with respect to matters coming before him prior to the publication in the Canada Gazette of a proclamation by the Governor in Council declaring the war to no longer exist.

It was further enacted that the powers, jurisdiction and authority of the Paper Control Tribunal were so confirmed and extended as to enable it to determine finally after the declaration of peace all matters pending before and not finally determined by it at the date of such declaration, and to dispose of all appeals brought before it subsequent to such declaration from any act done by or order or decision of the Commissioner and Controller under the Act. It was also provided that, except for the purpose of finally completing all matters undertaken, and determining all matters arising prior to the declaration of peace, the powers, the authority and jurisdiction of the Commissioner and Controller of Paper and of the Paper Control Tribunal should cease upon the publication of the said proclamation.

It is not clear that any such proclamation as above defined was issued. There was an Order made by His Majesty in the Imperial Privy Council on February 9, 1920, and published in the Canada Gazette on the same date, declaring January 10, 1920, as the date of the termination of the war with Germany. But there was war with other countries to which this Order did not relate, and of a proclamation as to these no evidence has been produced.

Their Lordships do not, however, consider this to be in itself important. For it is clear that on July 8, 1920, the Paper Control Tribunal when it made the Order under which the claim in this action arose, made it on an appeal from an Order of Mr. Pringle, the Controller, dated December 24, 1919. The Order on appeal of July 8, 1920, disposed of matters down to December 31, 1919. It altered certain prices governing periods, which prices the Controller had fixed in the past, increasing some of these and diminishing others, and directed any excess thus

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brought out of amounts charged by the appellants to be repaid, subject to set-off.

Their Lordships think that the effect of these Orders, assuming the Dominion Government and Legislature had authority to make them, was to render the appellants liable to account for the balance of the prices received by them from time to time up to the end of 1919 in excess of what was ultimately allowed, on the footing of being money had and received to the use of the respondents. No question arises as to figures, and the Orders are in such a form that they must be taken as intended to operate retrospectively.

The question, therefore, becomes one of constitutional law, as to whether the procedure thus established had a valid basis. This depends, in the first place, on whether the two statutes already quoted were *intra vires* of the Dominion Parliament.

It is clear that in normal circumstances the Dominion Parliament could not have so legislated as to set up the machinery of control over the paper manufacturers which is now in question. The recent decision of the Judicial Committee in the *Board of Commerce Case* (1), as well as earlier decisions, show that as the Dominion Parliament cannot ordinarily legislate so as to interfere with property and civil rights in the Provinces, it could not have done what the two statutes under consideration purport to do had the situation been normal. But it does not follow that in a very different case, such as that of sudden danger to social order arising from the outbreak of a great war, the Parliament of the Dominion cannot act under other powers which may well be implied in the constitution. The reasons given in the *Board of Commerce Case* (1) recognize exceptional cases where such a power may be implied.

In the event of war, when the national life may require for its preservation the employment of very exceptional means, the provision of peace, order and good government for the country as a whole may involve effort on behalf of the whole nation, in which the interests of individuals may have to be subordinated to that of the community in a fashion which requires s. 91 to be interpreted as providing for such an emergency. The general control of property and

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civil rights for normal purposes remains with the Provincial Legislatures. But questions may arise by reason of the special circumstances of the national emergency which concern nothing short of the peace, order and good government of Canada as a whole.

The overriding powers enumerated in s. 91, as well as the general words at the commencement of the section, may then become applicable to new and special aspects which they cover of subjects assigned otherwise exclusively to the Provinces. It may be, for example, impossible to deal adequately with the new questions which arise without the imposition of special regulations on trade and commerce of a kind that only the situation created by the emergency places within the competency of the Dominion Parliament. It is proprietary and civil rights in new relations, which they do not present in normal times, that have to be dealt with; and these relations, which affect Canada as an entirety, fall within s. 91, because in their fullness they extend beyond what s. 92 can really cover. The kind of power adequate for dealing with them is only to be found in that part of the constitution which establishes power in the State as a whole. For it is not one that can be reliably provided for by depending on collective action of the Legislatures of the individual Provinces agreeing for the purpose. That the basic instrument on which the character of the entire constitution depends should be construed as providing for such centralised power in an emergency situation follows from the manifestation in the language of the Act of the principle that the instrument has among its purposes to provide for the State regarded as a whole, and for the expression and influence of its public opinion as such.

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This principle of a power so implied has received effect also in countries with a written and apparently rigid constitution such as the United States, where the strictly federal character of the national basic agreement has retained the residuary powers not expressly conferred on the Federal Government for the component States. The operation of the scheme of interpretation is all the more to be looked for in a constitution such as that established by the British North America Act, where the residuary powers are given to the Dominion Central Government; and the preamble of the statute declares the intention to be that

the Dominion should have a constitution similar in principle to that of the United Kingdom.

Their Lordships, therefore, entertain no doubt that however the wording of ss. 91 and 92 may have laid down a framework under which, as a general principle, the Dominion Parliament is to be excluded from trenching on property and civil rights in the Provinces of Canada, yet in a sufficiently great emergency such as that arising out of war, there is implied the power to deal adequately with that emergency for the safety of the Dominion as a whole. The enumeration in s. 92 is not in any way repealed in the event of such an occurrence, but a new aspect of the business of Government is recognized as emerging, an aspect which is not covered or precluded by the general words in which powers are assigned to the Legislatures of the Provinces as individual units. Where an exact line of demarcation will lie in such cases it may not be easy to lay down a priori, nor is it necessary. For in the solution of the problem regard must be had to the broadened field covered, in case of exceptional necessity, by the language of s. 91, in which the interests of the Dominion generally are protected. As to these interests the Dominion Government, which in its Parliament represents the people as a whole, must be deemed to be left with considerable freedom to judge.

The other point which arises is whether such exceptional necessity as must be taken to have existed when the war broke out, and almost of necessity for some period subsequent to its outbreak, continued through the whole of the time within which the questions in the present case arose.

When war has broken out it may be requisite to make special provision to ensure the maintenance of law and order in a country, even when it is in no immediate danger of invasion. Public opinion may become excitable, and one of the causes of this may conceivably be want of uninterrupted information in newspapers. Steps may have to be taken to ensure supplies of these and to avoid shortage, and the effect of the economic and other disturbance occasioned originally by the war may thus continue for some time after it is terminated. The question of the extent to which provision for circumstances such as these may have to be maintained is one on which a Court of law is loath to enter. No authority other than the central Government

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is in a position to deal with a problem which is essentially one of statesmanship. It may be that it has become clear that the crisis which arose is wholly at an end and that there is no justification for the continued exercise of an exceptional interference which becomes ultra vires when it is no longer called for. In such a case the law as laid down for distribution of powers in the ruling instrument would have to be invoked. But very clear evidence that the crisis has wholly passed away would be required to justify the judiciary, even when the question raised was one of ultra vires which it had to decide, in overruling the decision of the Government that exceptional measures were still requisite. In saying what is almost obvious, their Lordships observe themselves to be in accord with the view taken under analogous circumstances by the Supreme Court of the United States, and expressed in such decisions as that in October, 1919, in *Hamilton v. Kentucky Distilleries Co.* (1)

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When then, in the present instance, can it be said that the necessity altogether ceased for maintaining the exceptional measure of control over the newspaper print industry introduced while the war was at its height? At what date did the disturbed state of Canada which the war had produced so entirely pass away that the legislative measures relied on in the present case became ultra vires? It is enough to say that there is no clear and unmistakable evidence that the Government was in error in thinking that the necessity was still in existence at the dates on which the action in question was taken by the Paper Control Tribunal. No doubt late in 1919 statements were made to the effect that the war itself was at an end. For example, in the Order in Council made at Ottawa on December 20, 1919, it is stated that it must "be realised that although no proclamation has been issued declaring that the war no longer exists, actual war conditions have in fact long ago ceased to exist, and consequently existence of war can no longer be urged as a reason in fact for maintaining these extraordinary regulations as necessary or advisable for the security of Canada."

The Order in Council then goes on to say that in consequence of the armistice of November, 1918, the Expeditionary Force had since been withdrawn and demobilised,

and the country generally is devoting its energies to re-establishment in the ordinary avocations of peace. In these circumstances, it states, the Minister of Justice considers that the time has arrived when the emergency Government legislation should cease to operate. This was in December, 1919. The Order then goes on to declare repealed all Orders and Regulations of the Governor in Council which depend for their sanction upon s. 6 of the War Measures Act, 1914, and repeals them as from January 1, 1920. But from this repeal it expressly excepts, among other Orders and Regulations specified, those relating to paper control, which are to remain in force until the end of another session of Parliament.

It will be observed that this Order in Council deals only with the results following from the cessation of actual war conditions. It excepts from repeal certain measures concerned with consequential conditions arising out of war, which may obviously continue to produce effects remaining in operation after war itself is over.

Their Lordships find themselves unable to say that the Dominion Government had no good reason for thus temporarily continuing the paper control after actual war had ceased, but while the effects of war conditions might still be operative. They are, therefore, unable to accept the propositions submitted to them in the powerful argument for the appellants. The reasons which bring them to this conclusion are not those of the Appellate Division of Ontario, which proceed on the hypothesis of a contract entered into by the appellants, a hypothesis which their Lordships are unable to entertain on the mere materials before them. Their reasons are more nearly those of the trial judge, Riddell J., although they desire to guard themselves from being regarded as accepting the suggestion made by that learned judge that "all the powers exercised by Minister, Controller and Tribunal were intra vires and valid, even in a state of profound peace."

Their Lordships will accordingly humbly advise His Majesty that the appeal should be dismissed with costs. A petition by the appellants for leave to adduce further evidence will also be formally dismissed with costs.

Solicitors for appellants: *Blake & Redden.*

Solicitors for respondents: *Lawrence Jones & Co.*

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[PRIVY COUNCIL]

CITY OF MONTREAL.....APPELLANT;

AND

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ATTORNEY-GENERAL FOR QUEBEC...INTERVENER.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR
THE PROVINCE OF QUEBEC, APPEAL SIDE.

*Canada—Taxation—Demised Crown Lands—Taxation of Lessee's Interest—
City of Montreal Charter (62 Vict. c. 58, Queb.), art. 362a—British North
America Act, 1867 (30 & 31 Vict. c. 3), s. 125.*

Art. 362a, added to the City of Montreal Charter by 7 Edw. 7, c. 63, art. 19, provides that persons occupying for commercial or industrial purposes Crown buildings or lands should be taxed as if they were the actual owners, and should be held liable to pay the annual and special assessments, the taxes and other municipal dues. Under the above provision annual assessments were made in respect of certain demised Crown lands; upon the tenant not paying taxes based upon the assessments the City sued him:—

Held, that as the tenant was liable only so long as his occupancy continued, the taxation was in respect of his interest as lessee, and accordingly was not a tax on Crown lands so as to be ultra vires under s. 125 of the British North America Act, 1867; and that the taxes were recoverable from the tenant by action or by distress of goods, but that the provisions of the Charter for the recovery of taxes by sale of the land were not applicable.

Smith v. Vermillion Hills Rural Council [1916] 2 A. C. 569 applied.

Judgment of the Appeal Side reversed.

APPEAL by special leave from a judgment (June 26, 1919) of the Court of King's Bench for Quebec (Appeal Side) reversing a judgment of the Recorder's Court of Montreal.

The appeal arose out of an action brought by the appellant city against one Baile in the Recorder's Court for the City of Montreal to recover certain municipal taxes for the years 1912 and 1913. The Attorney-General intervened and alleged that art. 362a of the Charter of the City (62 Vict. c. 58, Queb.), under which the taxes were imposed upon Baile as a tenant of demised Crown land, was ultra vires. The facts of the case and the relevant statutory provisions appear from the judgment of the Judicial Committee.

* *Present*: VISCOUNT CAVE, LORD PARMOOR, LORD PHILLIMORE, LORD JUSTICE-CLERK, and MR. JUSTICE DUFF.

The Recorder's Court held that the defendant Baile was personally liable to pay the taxes. On appeal the decision was reversed, the Court declaring that art. 362a was "without effect to empower" the City "to impose or charge the said taxes upon the said lands or upon any person as if he were owner thereof." The appeal is reported at Q. R. 29 K. B. 350.

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Special leave to appeal was granted.

1922. July 18, 20. *Atwater* K.C. and *St. Pierre* K.C. for the appellants; *Hon. Geoffrey Lawrence* for the Attorney-General for Quebec, intervener. A consideration of the taxing provisions of the City Charter shows that art. 362a taxes the tenant and his interest in the land, not the land itself. Under the law of Quebec, as contained in the Civil Code, a tenant has a real right in the demised land. If the true construction of art. 362a is in doubt, it should be given an effect which is intra, rather than ultra, vires; further, under art. 9 of the Civil Code no act of the Legislature affects the rights or prerogatives of the Crown unless expressly mentioned. The present case cannot properly be distinguished from *Smith v. Vermillion Hills Rural Council* (1); and the appellants' contention is supported by *Calgary and Edmonton Land Co. v. Attorney-General for Alberta* (2) and *Fraser v. City of Montreal* (3), the last-named case being directly in point.

Newcombe K.C. and *T. Mathew* for the respondent. Art. 362a in effect imposes a tax upon Crown lands and is ultra vires under s. 125 of the British North America Act, 1867. The terms of the statute show that the intention was to tax the immovable property; art. 362a provides that the tenant is to be taxed as if he were the owner, and Baile was so assessed in respect of this Crown land. The statute provided no machinery for taxing a tenant's interest, and there was nothing to prevent Crown lands from being sold to satisfy the charge: see Sect. XVIII. of the Act. The article would apply where the tenant's interest was of the smallest character, indeed smaller than the amount of the tax. *Smith's Case* (1) is distinguishable having regard to the provisions of the enactments respectively in question; in the statute there considered there was a definition of

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(1) [1916] 2 A. C. 569.

(2) (1911) 45 Can. S. C. R. 170.

(3) (1914) Q. R. 23 K. B. 242.

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land by which a tenant's interest was expressly included. Further the article is ultra vires, because the taxation is not direct taxation according to the view in *Cotton v. The King* (1); a tenant taxed as owner will obtain an indemnity from the Crown in the form of the rent paid or otherwise. [Reference was also made to *City of Victoria v. Bowes* (2) and *In re Town of Cochrane and Cowan*. (3)]

Atwater K.C. replied

Oct. 24. The judgment of their Lordships was delivered by

LORD PARMOOR. The statutory Charter of the City of Montreal, as amended from time to time down to, and including, the session of the Provincial Legislature of 1912, contains a series of provisions relating to "assessments and taxation," "valuation and assessment rolls," and "the sale of immovables for taxes and assessments." The sole question involved in the present appeal is whether art. 362a of the Charter, one of the articles included under the heading "assessments and taxation," is ultra vires the Legislature of the Province of Quebec.

The article is as follows: "362a. The exemptions enacted by article 362 shall not apply either to persons occupying for commercial or industrial purposes buildings or lands belonging to His Majesty or to the Federal and Provincial Government, or to the board of Harbour Commissioners, who shall be taxed as if they were the actual owners of such immovables and shall be held to pay the annual and special assessments, the taxes and other municipal dues."

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In the French version "the actual owners" are designated as "les véritables propriétaires," but it is not suggested that there is any distinction between the English and French versions. The language of art. 362a of the Charter is not clear. It has been construed in the Courts below to include properties, other than those exempted in art. 362. This construction was not questioned in the argument before their Lordships, and it is on this construction that the question of ultra vires directly arises.

The relevant facts may be shortly stated. By indenture of January 9, 1913, the Minister of Railways and Canals

(1) [1914] A. C. 176.

(2) (1901) 8 B. C. Rep. 363.

(3) (1921) 50 Ont. L. R. 169.

for Canada, as representative of the Crown, demised to Andrew Baile, a coal merchant, certain Crown lands in the City of Montreal for the term of five years, from October 1, 1912, at a rent of \$2,184 per annum. The lands so demised were assessed in the roll of immovable property and school taxes, for the years commencing May 1, 1912, and May 1, 1913, at a capitalised value of \$27,000, and in respect thereof a demand was made upon Andrew Baile, as an occupant of Government ground, for an annual tax of \$405 for each year, which amounted with interest to the sum of \$850.61. The sum of \$405 included \$270, being 1 per cent on the capitalised value of \$27,000, and a further sum of \$135 as school taxes. The appellants brought an action to recover \$850.61. Andrew Baile did not defend the action, but the Attorney-General for Canada intervened, claiming that art. 362a, above set out, was ultra vires of the Quebec Legislature, and unconstitutional, in so far as it applied to occupants of lands belonging to the Crown in the right of the Dominion of Canada, and that the land, contained in the demise to Andrew Baile, was exempt by virtue of s. 125 of the British North America Act. The case came, in the first instance, before the Recorder of Quebec, who decided against the contention of the Attorney-General for Canada, but this decision was reversed in a judgment of the Appeal Side of the Court of King's Bench for the Province of Quebec. Special leave to appeal against this judgment to His Majesty in Council was granted on July 22, 1920.

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The exhibits set out in the record contain the tax account for the years 1912-1913 directed to Andrew Baile, who is described as "occupant of Government ground," and as debtor to the City of Montreal "for annual assessments," amounting with interest in 1912 and 1913 to the sum of \$850.61, and extracts from the valuation and assessment roll of immovable property and school taxes for the years commencing May 1, 1912, and May 1, 1913. These extracts show that the sum of \$405 is made up of 1 per cent. on the capitalised value of the property, \$270, and of \$135 for school taxes. It is unnecessary to refer separately to the school taxes. They do not raise any special issue. Art. 393 of the Charter enacts that the roll for school taxes may be included in the register containing the assessment roll for immovables, and with the same formalities.

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Art. 362a of the Charter of the City of Montreal is one of a series of sections providing for assessments and taxation in the City of Montreal. Art. 361 enacts that all immovable property situated within the limits of the city shall be liable to taxation and assessment, except such as may, by the subsequent provisions of the Charter, be declared exempt therefrom. The appellants do not under this section claim to tax Crown property within the City occupied by the Crown or by persons occupying as holders of an official position under the Crown, or to question the immunity from provincial taxation of such property under s. 125 of the British North America Act 1867. It is alleged, however, by the respondent, the Attorney-General for Canada, that although the appellant is making no claim to tax property of the Crown, occupied by the Crown, or by persons occupying as holders of an official position under the Crown, yet in effect the city is seeking indirectly to tax such property and that such taxation is ultra vires of the Provincial Legislature. Their Lordships agree in the proposition that it would be ultra vires to attempt to impose indirectly taxation which cannot be imposed directly.

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On the other hand the respondent does not allege that persons occupying Crown property for commercial or industrial purposes are not liable to Provincial taxation in respect of their tenancy or occupation, provided that the taxation is imposed in such a form that it is in reality a taxation on the interest of the tenant or occupant, and not on the property of the Crown. It would not be possible after the decision of their Lordships in *Smith v. Vermillion Hills Rural Council* (1) to contend that tenants who occupy Crown property, not as officials of the Crown, but for commercial or business purposes, are not liable to Provincial taxation so long as the assessment is based on their interest as occupants.

In *Smith v. Vermillion Hills Rural Council* (1) it was held that the statutes imposing the taxation were not ultra vires of the Legislature of Saskatchewan. The following passage from the judgment designates clearly the contentions raised in that appeal: "The appellant was duly assessed in respect of the land comprised in the two leases, and the question is whether the assessment was valid. It is

(1) [1916] 2 A.C. 569.

contended for the appellant that the tax is sought to be imposed on the land itself, which belongs to the Crown in right of Canada, and not on any individual who is interested in it. For the respondents, on the other hand, it is argued that all that is taxed is the interest of the appellant as a tenant of the land and not the land itself as owned by the Crown. (1)" Their Lordships decided in favour of the latter of these contentions on the construction of the Saskatchewan statutes.

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Clause 6 of art. 361 of the Charter empowers the Council of the city to make by-laws to impose and levy on taxable immovable property in the city an assessment not to exceed 1 per cent. of the annual value of such property according to the valuation roll, such assessment to be a charge upon the immovable property, and the owners thereof to be personally liable therefor. No copy of the by-laws was attached to the case, but it was assumed throughout the argument that they had been made in due form. Art. 362 exempts certain immovable property from the ordinary and annual assessments. Then follows the critical art. 362a. It is not necessary to set this section out again, but the persons on whom the tax is imposed under its provisions are persons occupying for commercial or industrial purposes buildings or lands belonging to His Majesty, that is to say, occupants, and not owners. The taxation is imposed as an annual charge or rate, and the occupant is made liable to pay on an annual assessment. The assessments in question in this appeal are annual assessments, as shown in the exhibits of the tax account, and by the extracts from the valuation and assessment roll of immovable property.

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The question raised in this appeal is, however, in the main dependent on the further enactment that the occupants shall be taxed as if they were the actual owners of immovables and shall be held to pay the annual and special assessments, the taxes, and other municipal dues. The effect of this is that the occupants are made liable to pay on an annual assessment, not to exceed 1 per cent. of the capitalised value of the occupied property. The method of assessment determines the amount for which an occupier is liable during his occupancy, but does not alter the incidence of the

(1) [1916] 2 A.C. 573.

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taxation or transfer the incidence from the occupant to the owner. There is no suggestion that the assessment, in the case under appeal, has not been fairly ascertained, or that there has been any attempt to differentiate between the tenants of the Crown lands and the tenants of private individuals or Corporation, to the disadvantage of the Crown tenants.

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The ultimate incidence of taxation imposed on tenants, as the occupants of lands, is a matter on which economic experts have expressed different opinions. If, however, municipal taxation is to be regarded as *ultra vires*, on the ground that the ultimate incidence of taxation, or some portion of it, may or will fall on the owner, it is difficult to see in what form such taxation could be validly imposed. The question to be determined is the simpler one, whether the taxation, which is impeached, is assessed on the interest of the occupant, and imposed on that interest. In the opinion of their Lordships the interest of an occupant consists in the benefit of the occupation to him during the period of his occupancy, and does not depend on the length of his tenure. The annual assessment, to which objection is taken, is an assessment for which the tenant is only liable so long as his occupancy continues and which ceases so soon as his occupancy is determined. If on the cessation of his tenancy the Crown chooses to leave the land unoccupied or to occupy the land by an official acting in his official capacity, there would be no further liability to taxation under art. 362a of the Charter affecting either the land or the Crown. In the case under appeal the tenant is paying an annual rental of \$2,184, but is assessed at an annual aggregate charge, including school taxes, of \$405, which is somewhat less than one-fifth of the rental.

In assessing the annual interest for taxation of an occupant of land, every occupant is assessed as the person for the time being in beneficial occupation of the land taxed. Any method of assessment, based on variations in the duration of tenure, would inevitably result in an unequal distribution of the tax burden and, if applied to the occupants of Crown lands, would unfairly increase the burden on the occupants of lands owned by private individuals or corporations.

Their Lordships in this respect agree with the reasons given in the judgment of Meredith C.J.O. in *In re Town*

of *Cochrane and Cowan*. (1) He said: "I see no reason why a Provincial Legislature may not provide that, in assessing the interest of an occupant of Crown lands or of any other person in them, it shall be assessed according to the actual value of the land, or in other words that the taxes payable by him shall be based on that value; the manifest injustice that would otherwise exist, at all events in the case of an occupant or tenant, is obvious. He would be assessed only for the value of his interest, which might be little or nothing, while his neighbour, who is an occupant or tenant of property owned by a private person, would be taxed on the actual value of the land."

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The only remaining question is one of procedure. In the present case an action was brought for recovery of the amount due, and no objection was raised to this form of procedure. In addition the provisions to recover arrears of taxation by distress of the goods and chattels of the person bound to pay the same, and of all goods and effects in his possession in whatever place such goods and effects may be found, saving the exemptions provided by law under art. 287 of the Charter, would in ordinary cases be available against a tenant of the Crown in the same way as against any other tenant. The provision in s. xviii. of the Charter would not be available against Crown property, but it has not been attempted to enforce this provision.

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Their Lordships will humbly advise His Majesty that the appeal should be allowed and the judgment of the Court of King's Bench set aside, and that the judgment of the Recorder of the City of Montreal should be restored. The Attorney-General for Canada will pay the appellants' costs. There will be no costs of the intervener, the Attorney-General for Quebec.

Solicitors for appellants and intervener: *Blake & Redden*.

Solicitors for respondent: *Charles Russell & Co.*

[PRIVY COUNCIL.]

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BROOKS-BIDLAKE AND WHITTALL,
LIMITED.....

APPELLANTS;

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ATTORNEY-GENERAL FOR
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RESPONDENTS.

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ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada (British Columbia)—Legislative Authority—Employment of Chinese and Japanese—Special Timber Licence—Japanese Treaty Act, 1913 (3 & 4 Geo. 5, c. 27, Dom.)—Oriental Orders in Council Validation Act, 1921 (11 Geo. 5, c. 49, B.C.)—British North America Act, 1867 (30 & 31 Vict. c. 3), s. 91 (25), s. 92 (5), s. 109.

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The appellants were holders of licences granted in 1912 enabling them to cut timber on certain lands of the Province of British Columbia, and containing a provision that no Chinese or Japanese labour was to be employed in connection therewith. The licences were for a year, but were renewable from year to year if the terms had been complied with. The provision above mentioned was declared to be invalid by the Court of Appeal of the Province in 1920, but the Legislature of the Province in 1921 passed an Act (11 Geo. 5, c. 49) declaring that the provision had the force of law, and that a violation of it should be a sufficient ground for cancelling a licence. The Appellants, who employed both Chinese and Japanese, sued for a declaration that they were entitled so to do, and that the Act above referred to was beyond the powers of the Provincial Legislature:—

Held, (1.) that the Act was not ultra vires the Provincial Legislature under the British North America Act, 1867, since although by s. 91, head 25, the Dominion Legislature had exclusive legislative authority as to "naturalization and aliens," the functions of regulating the management of the property of a Province, and of determining whether a grantee or licensee of that property should or should not employ persons of a certain race, were assigned by s. 92, head 5, and s. 109 to the Legislature of the Province, and there was nothing in s. 91 conflicting with that view; (2.) that as the appellate had employed, and claimed the right to employ, both Chinese and Japanese, it was not necessary to determine whether the Act was repugnant to an Act of the Dominion Parliament (3 & 4 Geo. 5, c. 27) by which it was declared that a Treaty signed in 1911 between Great Britain and Japan, and dealing (inter alia) with the pursuit of their industries by subjects of Japan, should have the force of law in Canada; (3.) that the condition against the employment of Chinese having been broken the appellants had no right to renewals of the licences.

Union Colliery Co. v. Bryden [1899] A. C. 580 distinguished.

Cunningham v. Tomey Homma [1903] A. C. 151 followed.

Judgment of the Supreme Court affirmed.

* *Present*: VISCOUNT CAVE, L.C., VISCOUNT HALDANE, LORD DUNEDIN, LORD SHAW, and LORD CARSON.

APPEAL (No. 73 of 1922) by special leave from a judgment of the Supreme Court of Canada (February 7, 1922) reversing a judgment of the Supreme Court of British Columbia.

The appellants brought an action against the respondents, the Attorney-General for British Columbia and the Minister of Lands of that Province, for a declaration that they were entitled to employ Chinese and Japanese labour notwithstanding a provision to the contrary in licences to cut timber issued to them by the Minister; for a declaration that a statute of British Columbia—namely, the Oriental Orders in Council Validation Act, 1921 (11 Geo. 5, c. 49), was insufficient in law to validate the said provision and was beyond the powers of the Provincial Legislature; they further claimed an injunction restraining the respondents from interfering with their enjoyment of their timber licences on the ground of their employment of Chinese and Japanese.

The facts of the case appear from the judgment of the Judicial Committee.

The trial judge (Murphy J.) upon an application for an interlocutory injunction, which was treated as a motion for judgment, gave judgment for the appellants; the learned judge considered that he was bound by the decision of the Court of Appeal of the Province in *Re the Japanese Treaty Act*. (1) He made an order substantially as claimed by the appellants.

By consent the respondents appealed direct to the Supreme Court of Canada, which heard the appeal at the same time as a reference by the Governor-General referring to that Court the question of the validity of the Act of British Columbia above mentioned.

Upon the reference the learned judges by a majority (Davies C.J. and Duff, Anglin, Brodeur, Mignault JJ.; Idington J. dissenting) held that the Act was invalid. The proceedings are reported at 63 Can. S. C. R. 293.

After delivering their opinions on the reference the learned judges gave judgment unanimously allowing the appeal in the present case. Duff and Anglin JJ. held that the validity of the Act was not material since the licences had

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lapsed and there was no authority to renew them, having regard to the breach of the provision. Mignault J. (with whom Davies C.J. concurred) held that the validity of the Act was not material, because if it was invalid the licences were so also. Idington J. was of opinion that the Act was not ultra vires the Legislature of British Columbia under the British North America Act, 1867; that the Japanese Treaty Act, 1913 (3 & 4 Geo. 5, c. 27, Dom.), did not affect the matter, but that in any case that Act did not refer to Chinese labour, as to which there had been a breach; he also adopted the view of Mignault J. above stated. The appeal is reported at 63 Can. S. C. R. 466.

1922. Dec. 11, 12. 1923. Jan. 24. *Hon. Sir Malcolm Macnaghten K.C. and Bischoff* for the appellants. The statute was ultra vires the Legislature of British Columbia, since the subject matter "naturalization and aliens" is placed within the exclusive legislative power of the Dominion by s. 91, head 25, of the British North America Act, 1867. The legislation falls within the decision of the Board in *Union Colliery Co. v. Bryden* (1), not within that in *Cunningham v. Tomey Homma*. (2) The "pith and substance" of the legislation was its effect as to aliens. Further, the statute is invalid in that it conflicts with the Japanese Treaty Act (3 & 4 Geo. 5, c. 27) passed by the Dominion Legislature. Under that Treaty and Act Japanese subjects in Canada had the right not to be excluded from among those who might be employed in any industry. The view that invalidity of the provision made the licence invalid is erroneous. The provision is severable from the licence and should be treated as expunged.

Sir John Simon K.C. and Hon. Geoffrey Lawrence for the respondents. The Act was not ultra vires the Legislature of British Columbia under the British North America Act, 1867. Like the Act considered in *Cunningham v. Tomey Homma* (3) it had not necessarily anything to do with "naturalization and aliens." It excluded a Japanese born in Canada as much as a Japanese who was an alien. The subject matter was the management of the public lands of the Province, which is exclusively confided to the Provincial Legislature by s. 92, head 5. The Dominion must exercise its exclusive authority so as not to conflict with proprietary

(1) [1899] A. C. 580.

(2) [1903] A. C. 151.

(3) [1903] A. C. 151, 156.

rights within a Province: *Attorney-General for Canada v. Attorney-General for Quebec*. (1) If the provision was valid when it was inserted in the licences in 1912, the Treaty Act which came into force in April, 1913, does not affect the matter. Having regard to the Crown Lands Act (B. C.), 1908, s. 57, sub-s. 3 (as amended by the statutes for 1910, c. 28, s. 6), there was no authority to renew the licences upon the failure to observe its provisions. In any case the Treaty Act has no bearing upon the employment of Chinese; the appellants have employed both Chinese and Japanese and claim the right to do so.

Hon. Sir Malcolm Macnaghten K.C. replied.

Feb. 23. The judgment of their Lordships was delivered by

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VISCOUNT CAVE L.C. This is an appeal by the plaintiffs in the action from a judgment of the Supreme Court of Canada which reversed a judgment of the Supreme Court of British Columbia and dismissed the plaintiffs' action. The substantial question to be determined is whether the appellants are entitled to a renewal of certain licences to cut and carry away timber from lands belonging to the Province of British Columbia.

The appellants and their predecessors in title were for some time the holders of special timber licences granted by the Minister of Lands of British Columbia under the authority of the Land Act of that Province, and enabling them to cut and carry away timber from certain lands belonging to the Province. Each of these licences was granted for a year only; but under s. 57, sub-s. 3 (*a*), of the Crown Lands Act a licence was renewable from year to year if the terms and conditions of the licence had been complied with. Each licence contained a stipulation in the following terms: "N.B.—This licence is issued and accepted on the understanding that no Chinese or Japanese shall be employed in connection therewith."

This stipulation was inserted in compliance with Orders of the Lieutenant-Governor in Council dated May 26 and June 18, 1902. The stipulation had not been observed by the appellants, but the licences were nevertheless renewed or treated as renewed on the same terms in every

(1) [1921] 1 A. C. 413.

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year down to and including the year commencing February 11, 1920.

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On November 16, 1920, the Court of Appeal for British Columbia, on a reference by the Lieutenant-Governor in Council, held the above stipulation to be unauthorized and invalid, partly on the ground that it conflicted with s. 91, head 25, of the British North America Act, by which the exclusive right of legislation with reference to "naturalization and aliens" was reserved to the Dominion Parliament, and partly on the ground that it was repugnant to a Dominion statute, the Japanese Treaty Act, 1913, by which it was declared that the Treaty signed on April 3, 1911, between His Majesty the King and the Emperor of Japan, under which the subjects of the high contracting parties were "in all that related to the pursuit of their industries, callings, professions and educational studies" to be placed in all respects on the same footing as the subjects or citizens of the most-favoured nation, should have the force of law in Canada: see *Re the Japanese Treaty Act*, 1913. (1) Notwithstanding this decision, the licences were renewed to the appellants in February, 1921, for another year on the same terms; and by the Oriental Orders in Council Validation Act of British Columbia, passed in April, 1921, it was declared that the Orders in Council and the stipulation in question were valid, and had the force of law, and that the violation of any such stipulation in any instrument should be sufficient ground for the cancellation of that instrument. It is not easy to understand why it was considered worth while to pass this enactment, for if (as the Court of Appeal had held) the stipulation was void as conflicting with Imperial or Dominion statutes, no Provincial legislation could give it validity. Fortified by this enactment, however, the Minister of Lands, by a letter dated August 24, 1921, called the attention of the appellants to their breach of the stipulation, and threatened to cancel their licences.

On September 3, 1921, the appellants commenced this action in the Supreme Court of British Columbia against the Attorney-General for British Columbia and the Minister of Lands, claiming a declaration that, notwithstanding the above stipulation, they were entitled to employ Chinese and Japanese upon the timber lands, and an injunction

restraining the defendants from interfering with the enjoyment by the plaintiffs of their licences. On an interlocutory motion for an injunction in the above terms, Murphy J., holding himself bound by the above-mentioned decision of the Court of Appeal of British Columbia, granted the injunction. The defendants (by consent) appealed against this order directly to the Supreme Court of Canada. While the appeal was pending, the Governor-General in Council referred to the Supreme Court of Canada the general question whether the Oriental Orders in Council Validation Act was in excess of the powers of the Legislature of British Columbia; and the Supreme Court, having before it both the general reference as to the validity of the Act of 1921 and the appeal of the defendants in this action, heard both matters together, and on February 7, 1922, gave successive judgments in both. On the general reference, the Supreme Court, by a majority, answered the question put to them in the affirmative; but the reasons given for this decision varied, and the result was to leave the law in some doubt. The case was heard by a full Court consisting of Davies C.J., and Idington, Duff, Anglin, Brodeur and Mignault JJ. and of these three (Davies C.J. and Anglin and Mignault JJ.) held the stipulation void under s. 91 of the British North America Act, and two (Davies C.J. and Duff J.) held it to be invalid as conflicting with the Japanese Treaty Act. Brodeur J., while holding the Provincial statute to be invalid as regards Japanese subjects on account of the Japanese Treaty Act, held it valid as regards Chinese. The remaining judge (Idington J.) held the stipulation to be wholly valid. The Court then proceeded to give judgment on the appeal in this action, and unanimously allowed the appeal and dismissed the action, mainly on the ground that, even though the condition as to not employing Oriental labour was void, it could not be struck out of the licence, and the right to renewal, being founded on an illegal condition, must fail. Thereupon the present appeal was brought.

The points raised for consideration are two—namely: (1.) Was the stipulation against employing Chinese or Japanese in connection with the timber licences valid, or was it wholly or partly void as conflicting with (a) the British North America Act or (b) the Japanese Treaty Act of the Dominion; and (2.) If the stipulation was void,

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were the appellants entitled to a renewal of their licences? The threat to cancel the licences as existing on August 24, 1921, is no longer material, as those licences would in any case have expired on February 11, 1922. It is the right to renewal which is now the substantial issue.

Their Lordships will deal first with the contention that the stipulation in question is void as conflicting with the British North America Act, 1867. It is said that, as s. 91, head 25, of the British North America Act reserves to the Dominion Parliament the exclusive right to legislate on the subject of "naturalization and aliens," the Provincial Legislature is not competent to impose regulations restricting the employment of Chinese or Japanese on Crown property held in right of the Province. Their Lordships are unable to agree with this contention. Sect. 91 reserves to the Dominion Parliament the general right to legislate as to the rights and disabilities of aliens and naturalized persons; but the Dominion is not empowered by that section to regulate the management of the public property of the Province, or to determine whether a grantee or licensee of that property shall or shall not be permitted to employ persons of a particular race. These functions are assigned by s. 92, head 5, and s. 109 of the Act to the Legislature of the Province; and there is nothing in s. 91 which conflicts with that view. In *Union Colliery Co. v. Bryden* (1) this Board held that a section in a statute of British Columbia which prohibited the employment of Chinamen in coal mines underground was beyond the powers of the Provincial Legislature; but this was on the ground that the enactment was not really applicable to coal mines only—still less to coal mines belonging to the Province—but was in truth devised to prevent Chinamen from earning their living in the Province. On the other hand, in *Cunningham v. Tomey Homma* (2), where another statute of British Columbia had denied the franchise to Japanese, the Board held this to be within the powers of the Provincial Legislature, which had the exclusive right to prescribe the conditions under which the Provincial legislative suffrage was to be conferred. And in *Attorney-General for Canada v. Attorney-General for Ontario* (3) it was held that the reservation to the Dominion Parliament by s. 91, head 12, of the

(1) [1899] A.C. 580.

(2) [1903] A.C. 151.

(3) [1898] A.C. 700.

Act of 1867 of the right to legislate as to "sea coast and inland fisheries" did not prevent a Province in which a fishery was vested from settling the conditions upon which fishing rights should be granted. To the same effect is *Attorney-General for Canada v. Attorney-General for Quebec*. (1) In their Lordships' opinion, the present case falls within the principle of the authorities last cited and not within *Bryden's Case* (2), and accordingly the stipulation in dispute is not void as contrary to s. 91 of the British North America Act.

This conclusion is sufficient to dispose of the present appeal. Each licence is issued upon the understanding that no Chinese or Japanese shall be employed in connection therewith; and the appellants' right to renewal is contingent upon their complying with this stipulation. It appears from the indorsement of the writ in this action, as well as from para. 5 of the affidavit filed by the appellants in support of the motion, that they have employed and claim the right to employ both Chinese and Japanese labour. Now, whatever may be said as to the stipulation against employing Japanese labour, there is nothing (apart from the British North America Act) to show that a stipulation against the employment of Chinese labour is invalid. The stipulation is severable, Chinese and Japanese being separately named; and the condition against employing Chinese labour having been broken, the appellants have no right to renewal. Upon this point their Lordships agree with Brodeur J.

Having regard to the above considerations, the point raised on the Japanese Treaty Act does not arise, and their Lordships think it unnecessary to deal with it. They will humbly advise His Majesty that this appeal fails, and should be dismissed with costs.

Solicitors for appellants: *Bischoff, Cox, Bischoff & Thompson*.

Solicitors for respondents: *Gard, Lyell, Betenson & Davidson*.

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(1) [1921] 1 A.C. 413.

(2) [1899] A.C. 580.

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McCOLL..... APPELLANT;

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1923 A.C. CANADIAN PACIFIC RAILWAY }
p. 126 COMPANY..... } RESPONDENTS.

ATTORNEY-GENERAL FOR MANITOBA INTERVENER.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Canada—Fatal Accident—Dominion Railway—Breach of Order of Railway Board—Accident and Action in Manitoba—Cause of Action—Dominion and Provincial Acts—Incidental Conflict—Railway Act (9 & 10 Geo. 5, c. 68, Dom.), s. 385—Workmen's Compensation Act (6 Geo. 5, c. 125, Man.), s. 13.

The appellant's husband, in the course of his employment by the respondents, a Dominion railway company, was killed in Manitoba, where he resided, owing to the failure of the respondents' servants to comply with an order of the Railway Board of Canada. She sued the respondents in Manitoba claiming damages under the Fatal Accidents Act (R.S. Man., 1913, c. 36) and under s. 385 of the Railway Act of Canada (9 & 10 Geo. 5, c. 68).

By s. 385 of the Railway Act any company which does any act contrary to the orders of the Railway Board is "liable to any person injured . . . for the full amount of the damages sustained thereby." Under the Workmen's Compensation Act of Manitoba (6 Geo. 5, c. 125) the deceased man, and his dependents, had a right to compensation, but s. 13 provided that that right was in lieu of any right of action, statutory or otherwise, to which he or they might be entitled against the respondents by reason of the accident, and that no action in respect thereof should lie. An accident under the Fatal Accidents Act of Manitoba (R.S. Man., 1913, c. 36) lies only if the person killed, had he lived, could have maintained an action.

Held (1.) that the appellant was not a "person injured" within the meaning of s. 385 of the Railway Act, since the operation of the section was subject to the common law rule that an action does not lie for damages suffered in consequence of the death of a human being; and (2.) that there could not be implied in s. 13 of the Workmen's Compensation Act an exception preventing an action under s. 385 by the deceased, had he survived, from being barred. The Dominion and the Provincial Acts dealt with different subjects, and the fact that a conflict might arise was not a ground for implying words of exception in the Provincial Act.

Judgment of the Court of Appeal affirmed.

APPEAL from a judgment (December 20, 1921) of the Court of Appeal for Manitoba, affirming a judgment of Prendergast J.

1923 A.C. The appellant sued the respondents, a Dominion railway,
p. 127 in the Court of King's Bench of Manitoba, claiming damages,

**Present:* VISCOUNT CAVE, LORD PARMOOR, and MR. JUSTICE DUFF.

on behalf of herself and her infant daughter, in consequence of the death of her husband. Her husband, in the course of his employment by the respondents, had been killed in Manitoba owing to the respondents' servants failing to comply with an order of the Board of Railway Commissioners of Canada. The action was brought under the Fatal Accidents Act of Manitoba (R.S. Man., 1913, c. 36) and under the Railway Act of Canada (9 & 10 Geo. 5, c. 68). The facts and the relevant statutory provisions appear from the judgment of the Judicial Committee.

The Court of Appeal affirmed the trial judge, who had dismissed the action. The appellant obtained leave to appeal in forma pauperis.

1922. July 7, 14. *Hon. Geoffrey Lawrence* and *D. Campbell* for the appellant. The appellant can maintain this action under s. 385 of the Railway Act (9 & 10 Geo. 5, c. 68, Dom.); she was a "person injured" by the breach of the orders of the Railway Board within that section. The loss to the appellant owing to the death of her husband constituted a legal injury: *Pym v. Great Northern Ry. Co.* (1); *Blake v. Midland Ry. Co.* (2). The words cannot mean only a person physically injured, because the section clearly applies to injury to a person's goods. The right of action was not taken away by s. 13 of the Workmen's Compensation Act of Manitoba. Having regard to the definition of "accident" in s. 2, and to s. 3, of that Act, an action under s. 385 of the Railway Act is not an action "for, or by reason of the accident" so as to be barred by s. 13. If, on the true construction of s. 13, it purports to bar an action under s. 385, it is to that extent ultra vires. Sect. 385 of the Railway Act deals with breaches by Dominion railways of the provisions of the Act, and therefore with a matter within the legislative power of the Dominion and expressly excluded from that of the Province: *Grand Trunk Ry. Co. of Canada v. Attorney-General of Canada*. (3) It was not competent to the Province to bar the right given. If, therefore, s. 13 by its terms does so, it must in effect be subject to an implied exception of actions of that character. In any case the appellant's husband was a "person injured." Had he survived he would have had a right of action under s. 385, and for the reasons adduced that right would not

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(1) (1863) 4 B. & S. 396.

(2) (1852) 18 Q. B. 93.

(3) [1907] A.C. 65.

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have been barred by s. 13 of the Provincial Act; consequently, the appellant could maintain the action under the Fatal Accidents Act.

Tilley K.C., for the respondents, contended as appears from the judgment.

Sir John Simon K.C. and *MacWilliams K.C.*, for the interveners.

Oct. 26. The judgment of their Lordships was delivered by

MR. JUSTICE DUFF. This appeal presents a question as to the construction of s. 385 of the Railway Act of Canada, and one as to the construction and effect of the Workmen's Compensation Act of Manitoba, s. 13 of c. 125 of the statutes of Manitoba, 6 Geo. 5.

The appellant's husband, a workman employed on the respondents' railway, was killed when travelling on one of the respondents' trains in the course of his employment, when the car on which he was riding came into collision with an obstruction and was wrecked. The accident was due to the neglect of the Company's servants in not observing an order of the Board of Railway Commissioners for Canada, which required the defendant Company in loading its railways cars to be governed by "the clearance limits" of the road over which they passed.

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The section of the Railway Act with which we are concerned, is s. 385 and is in these words:—"Any company which, or any person who, being a director or officer thereof, or a receiver, trustee, lessee, agent, or otherwise acting for or employed by such company, does, causes or permits to be done, any matter, act or thing contrary to the provisions of this or the Special Act, or to the orders, regulations or directions of the Governor-in-Council, or of the Minister, or of the Board, made under this Act, or omits to do any matter, act or thing, thereby required to be done on the part of any such company, or person, shall, in addition to being liable to any penalty elsewhere provided, be liable to any person injured by any such act or omission for the full amount of damages sustained thereby, and such damages shall not be subject to any special limitation except as expressly provided for by this or any other Act."

The appellant's husband having received the injury which caused his death from a contravention of an order of the

Board of Railway Commissioners, on behalf of the appellant it is contended that she herself (as well as her infant daughter, for whose benefit she sues), is in respect of the loss accruing to her in consequence of his death, a "person injured," within the meaning of the section, and that the effect of the section is to create, without regard to Provincial law, a liability to each of them in respect of such loss. On behalf of the respondents, Mr. Tilley argues that the section creates no liability independently of the law of the Province where the injury occurs, and that its office is limited to affirming the responsibility of the company, and of the persons to whom it applies according to the principles of Provincial law for acts or omissions falling within it. Their Lordships consider it unnecessary to express any opinion upon this view advanced by the respondents as to the construction and effect of the section.

The contention of the appellant in effect is that s. 385 establishes in respect of acts and omissions to which it applies a new principle of responsibility. New in the sense that independently of Provincial legislation it creates a liability to pay damages in a civil action for causing the death of a human being and new in the sense that the liability so created extends to consequences which are neither the immediate nor the direct result of the act or omission complained of nor within the intention actual or presumed of the defendant.

It must indeed be apparent that if under this section the dependents of a person suffering death in consequence of a dereliction falling within it are entitled to be indemnified in respect of "the full amount of damages sustained" by reason of such death, then the statutory right of indemnity must, by strict analogy, be shared by other classes of persons having legal or business relationships with the deceased and suffering loss in consequence of being deprived of advantages which they might reasonably have expected to enjoy if he had continued to live. Nor, if this be the effect of the section in cases in which death has ensued, can responsibility be limited to such cases. It must exist in numerous other cases where loss is indirectly inflicted upon persons other than those who suffer directly in their persons or property by reason of a default within the section; as for instance where a breach of statutory duty causes an injury disabling the immediate sufferer from performing his contractual

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obligations or carrying out his business or professional engagements or making provision in the usual way for his family.

It is of course conceivable that interests thus indirectly affected might be considered by a legislator to be fit subjects for protection by remedial process; but the difficulty of prescribing limits for the operation of such a method of assigning responsibility is obvious, and the common law, speaking generally, regards the protection of such interests as impracticable. As Blackburn J. (as he then was) said in delivering the judgment of the Court of Queen's Bench in *Cattle v. Stockton Waterworks Co.* (1): "It may be said that it is just that all such persons should have compensation for such a loss, and that, if the law does not give them redress, it is imperfect. Perhaps it may be so. But, as was pointed out by Coleridge J., in *Lumley v. Gye* (2), Courts of justice should not 'allow themselves, in the pursuit of perfectly complete remedies for all wrongful acts, to transgress the bounds which our law, in a wise consciousness as I conceive of its limited powers, has imposed on itself, of redressing only the proximate and direct consequences of wrongful acts.' In this we quite agree."

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"Instances might be indefinitely multiplied" Lord Penzance observed in *Simpson v. Thompson* (3) of claims indistinguishable in principle from that now advanced "giving rise to rights of action which in modern communities, where every complexity of mutual relation is daily created by contract, might be both numerous and novel."

Their Lordships think that an intention to establish a novel principle of responsibility of such indefinite scope in relation to a special class of acts and omissions ought not to be inferred from general words which are not apt for the purpose, and to which full effect can be given by a construction in harmony with the policy of the law in granting redress in other cases of *injuria cum damno*.

The Courts below have taken the view that the operation of the section is subject to the rule of the common law that an action does not lie for damages suffered in consequence of the death of a human being. Their Lordships see no reason

(1) (1875) L.R. 10 Q.B. 453, 457.

(2) (1853) 2 E. & B. 216, 252.

(3) (1877) 3 App. Cas. 279, 290.

to differ from this conclusion; and their Lordships agree with the observation of Prendergast J. that in this connection the absence of anything specifying the class or classes of persons entitled to indemnity in such circumstances is significant.

Since Lord Campbell's Act was enacted in 1846 similar legislation has been passed by many Legislatures in the United States as well as in British dominions. Many of these statutes are collected in an appendix to Shearman and Redfield's Law of Negligence, and it appears to be the general practice in enacting such statutes to define the class or classes of persons for whose benefit an action may be brought; and the fact that the Railway Act is silent upon this matter affords, their Lordships agree, an indication that the section is not addressed to the subject of indemnity for damages arising from death.

The opinion already indicated touching the effect of the general words employed in s. 385 is not without support from the analogy of decided cases dealing with similar language in other statutes. In *The Vera Cruz* (1), for example, the plaintiff contended that an action in rem for damages under Lord Campbell's Act was within the jurisdiction created by the Admiralty Court Act of 1861 (24 Vict. c. 10), s. 7, which gave power to that Court to entertain an action in rem when brought to enforce "any claim for damage done by any ship." In the judgments of the Lords Justices there are observations apposite to the question now presented for decision. Bowen L.J. said: "The plaintiff is in this dilemma. The only claim that can arise must either be a claim for the killing of the deceased, or the injuriously affecting his family. The killing of the deceased per se gives no right of action at all, either at law or under Lord Campbell's Act. But if the claim be, as it only can be, for the injuriously affecting the interests of the dead man's family, the injuriously affecting of their interests is not done by the ship in the above sense. It arises partly from the death which the ship causes, and partly from a combination of circumstances, pecuniary or other, with which the ship has nothing to do. The injury done to the family cannot, therefore, be said to be done by the ship." (2) Fry L.J. added: "Secondly, assuming injury to the person to be within the section, is an action under Lord Campbell's

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(1) (1884) 9 P.D. 96.

(2) (1884) 9 P.D. 101.

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Act within it? Compare, by way of illustration, damage done to a barge by the bowsprit of a ship, and a person killed by the same thing. In the first instance, the cause of action is the injury actually caused by the ship. But in the second, the real ground of action is injury sustained by relatives resulting from the death of a person which resulted from the damage done to him by the ship. It cannot be correctly said that it is an action *for* damage done (which are the words of the Act) though it is for damages resulting from or arising out of damage done." (1)

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Again, in the *British Columbia Electric Ry. Co. v. Gentile* (2) the question before this Board was whether a clause in the appellant company's special Act affecting actions against the company "for indemnity for any damage or injury sustained by reason of the railway or the operations of the company" with a certain time limit applied to an action under the British Columbia Statute re-enacting Lord Campbell's Act taken by the dependents of a person killed in circumstances which, if he had survived, would have brought his right of action within the clause. Lord Dunedin in delivering the judgment of the Board said that "indemnity" in the clause mentioned "obviously means indemnity to the plaintiff in the suit, in respect of wrong done to the plaintiff and damages sustained by him owing to the railway or the operations of the company," (3) and the Board held that "a suit brought under the provisions of that Act" (Lord Campbell's Act) "is not a suit for indemnity for damage or injury sustained by the plaintiff by reason of the operations of the defendants" which "operations" *ex hypothesi* had been the cause of the death that was the foundation of the claim; in other words, an action under Lord Campbell's Act is not an action for "damage sustained by the plaintiff by reason of" the wrongful act which caused the death in respect of which the claim is made.

Their Lordships therefore think that the appellant's claim cannot be sustained by force of s. 385 alone.

The next question for consideration is that raised by the appellant's contention that a right to compensation is vested in her by the combined operation of the provision of the Railway Act already discussed and R. S. Man., 1913,

(1) [1884] 9 P.D. 101.

(2) [1914] A.C. 1034.

(3) [1914] A.C. 1039.

c. 36, ss. 2 and 3, which, in substance, reproduce the principal enactments of Lord Campbell's Act, 9 & 10 Vict. c. 93.

On behalf of the respondents, it is not disputed that the appellant would have a valid claim under this statute, were it not for certain provisions of the Workmen's Compensation Act, a statute of Manitoba (6 Geo. 5, c. 125), which, it is contended, deprive her of any such right. The Workmen's Compensation Act makes provision for a fund from which compensation is to be paid to workmen injured by accidents arising out of and in the course of, their employment, and to their dependents where such injury results in death, and creates a Board, known as the Workmen's Compensation Board, for its administration. By s. 13 it is enacted that the right to compensation given by the Act shall be "in lieu of all rights and rights of action, statutory or otherwise, to which a workman or his dependents are, or may be, entitled against the employer of such workman for, or by reason of, any accident" in respect of which a right of compensation is given, and it is further provided that "no action in any Court of law in respect thereof shall . . . lie." By s. 61, sub-s. 4, and by s. 13, sub-s. 2, it is in substance provided that the Board shall upon the application of any party to an action brought by a workman or his dependent against an employer, have jurisdiction to determine whether the party bringing the action is entitled to maintain it, or only to compensation under the Act, and that such decision shall be final and conclusive between the parties. The Board on November 24, 1920, after the commencement of the action from which the appeal arises, declared that the accident in respect of which the action was brought was one in respect of which the dependents of the deceased William McColl had a right to compensation under the Act, and that the right of action asserted was not maintainable.

It is quite clear that if s. 13 of the Workmen's Compensation Act applies to the claim advanced by the appellant, then that section affords an answer to the claim. On the part of the appellant it is contended that s. 13 does not apply, because on any admissible construction of s. 385 of the Railway Act, a right of action is thereby given to the employees of the Railway Company injured in consequence of any act or omission within the section, even though the circumstances of the injury should be such as

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would give the workman a right to compensation according to the terms of the Workmen's Compensation Act. It follows, it is argued, that s. 13 cannot apply to accidents giving rise to rights of action under s. 335, because it must be presumed that the Manitoba Legislature did not intend to enact legislation in conflict with the statutes of the Dominion Parliament within its undoubted jurisdiction.

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Their Lordships cannot agree that such an implied exception could properly be introduced into s. 13 of the Workmen's Compensation Act. Sect. 385 of the Railway Act (a statute passed by the Dominion Parliament) deals with the consequences, by way of civil liability, of the contravention of statutory enactments and regulations on the subject of railways. It was passed by Parliament in exercise of its jurisdiction over that subject. The Workmen's Compensation Act is an Act passed by the Province of Manitoba in exercise of its jurisdiction over civil rights imposing upon employers certain responsibilities and giving employees certain rights in respect of injuries arising out of industrial accidents. The enactments deal with different subject-matter, although the circumstances of a particular case may bring it within the scope of both enactments, in which case, if a conflict arises, it is the Dominion legislation which prevails. But such conflicts arise only incidentally, and the fact that they do arise is not a legitimate ground for implying words of exception in one of the sections of the Provincial statute, excluding from its application cases in which the Dominion Act does not apply.

The appellant and her infant daughter, having a right to compensation under the Workmen's Compensation Act, it follows that all rights which otherwise would have accrued to them under R. S. Man., 1913, c. 36, are displaced by s. 13 of the later statute.

For these reasons, the appeal, in their Lordships' opinion, fails, and they humbly advise His Majesty that it should be dismissed.

Solicitors for appellant: *Charles Russell & Co.*

Solicitors for respondents and intervener: *Blake & Redden.*

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THE KING.....APPELLANT;

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AND

ATTORNEY-GENERAL OF
BRITISH COLUMBIA.....} RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Bona vacantia—"Royalties"—*British North America Act*, 1867 (30 & 31 Vict. c. 3), ss. 102, 109. 1924 A.C. p. 213.

Bona vacantia are "royalties" within s. 109 of the *British North America Act*, 1867, and accordingly belong to the Province in which they are situate or arise, and not to the Dominion. The word "royalties" is used in the section as the equivalent of *jura regalia*. Its meaning is not limited by its association with the words "lands, mines, minerals."

Attorney-General of Ontario v. Mercer (1883) 8 App. Cas. 767 and *Attorney-General of British Columbia v. Attorney-General of Canada* (1888) 14 App. Cas. 295 applied.

Judgment of the Supreme Court of Canada affirmed.

APPEAL (No. 72 of 1922) by special leave from a judgment (May 31, 1922) of the Supreme Court of Canada (1) reversing a judgment (January 22, 1918) of the Exchequer Court.

The question in the appeal was whether a sum of \$7215, which moneys the parties agreed were *bona vacantia*, belonged to the Province of British Columbia, in which the fund arose, or to the Dominion of Canada. The circumstances in which the fund arose appear from the judgment of the Judicial Committee. 1924 A.C. p. 214.

By the *British North America Act*, 1867, s. 109, "all lands, mines, minerals and royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, . . . shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any interest other than that of the Province in the same." By Order in Council of May 16, 1871, pursuant to s. 146 of the Act of 1867, British Columbia was admitted as a Province to the

*Present: VISCOUNT HALDANE, LORD BUCKMASTER, LORD ATKINSON, LORD SHAW and LORD SUMNER.

(1) 63 Can. S.C.R. 622.

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Union, the provisions of that Act being made applicable to it as if it had been one of the Provinces originally united by the Act. Unless bona vacantia came within s. 109 they were appropriated to the public service of Canada under the general provision in s. 102 of the Act.

The Supreme Court of Canada (Idington, Duff, Anglin and Brodeur JJ.; Davies C.J. dissenting) held, reversing the Court of Exchequer, that bona vacantia were "royalties" within the meaning of s. 109, and that the fund in question accordingly belonged to the Crown in the right of the Province and not in the right of the Dominion. The appeal is reported at 63 Can. S.C.R. 622.

1923. July 10. *Newcombe K.C.* and *Stuart Moore* for the appellant.

Sir John Simon K.C., *Farris K.C.* (*Attorney-General of British Columbia*) and *Hon. Geoffrey Lawrence* for the respondent.

The arguments for the appellant appear from the judgment. Counsel for the respondent were stopped.

[Reference was made to *Attorney-General of Ontario v. Mercer* (1); *St. Catherine's Milling and Lumber Co. v. The Queen* (2); *Attorney-General of British Columbia v. Attorney-General of Canada (Precious Metals Case)* (3); and *Maritime Bank of Canada v. Receiver-General of New Brunswick*. (4)]

Oct. 18. The judgment of their Lordships was delivered by

LORD SUMNER. The issue in this appeal is whether, under the British North America Act, 1867, ss. 102 and 109, bona vacantia, found in the Province of British Columbia, belong to the Crown in right of the Province or in right of the Dominion. The facts are as follows:—

An English company, incorporated in 1871 under the English limited liability Acts to trade in British Columbia, was obliged to go into liquidation, and in 1879 the company and its then liquidator authorized a gentleman in British Columbia, named Rithet, to get in its property and assets in the Province, which he proceeded from time to time to do.

(1) 8 App. Cas. 767.
(2) (1888) 14 App. Cas. 46.

(3) (1889) 14 App. Cas. 295.
(4) [1892] A.C. 437.

The company was finally dissolved in 1907 and the liquidator died. In 1911 Mr. Rithet, having then in his hands a balance of \$7215 on account of the company in liquidation and finding that there remained no person and no company to whom he could pay this sum, placed the facts before the Governments both of the Dominion and of the Province, and having thus done his duty passes out of the story, leaving the disposition of this sum to the law. These facts are admitted, as is also the conclusion that the sum of \$7215 is bona vacantia falling to the Crown in one right or the other. On this footing their Lordships are finally to determine the question, which in Canada was decided in the Supreme Court of Canada by reversing the judgment of the Exchequer Court of Canada given in favour of the Dominion. All that need be noted about the actual subject matter of the dispute is that, as the parties have admitted it to be in itself bona vacantia, their Lordships have proceeded on the footing of this admission inter partes to consider the right to it.

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The appeal really depends on the true construction of the words "all lands, mines, minerals and royalties belonging to the several Provinces of" in s. 109 of the British North America Act, words which have already repeatedly come before their Lordships' Board for decision. In these cases their Lordships' predecessors were careful to confine the actual determination to the subject matter in hand, which was not in any of the cases either bona vacantia or any prerogative right of a precisely analogous character, but the reasoning on which one at least of those decisions is rested is so closely applicable to the present appeal, that the first question must now be how far, if at all, this appeal is not already covered by authority.

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In *Attorney-General of Ontario v. Mercer* (1), lands in Ontario, which had escheated to the Crown after 1867, were the subject matter of a contest of rights similar to that which now arises, and on the construction of s. 109 the Judicial Committee decided that the Province was entitled to the lands as against the Dominion. In so doing they expressly negatived the contentions now raised for the Dominion in two respects. It has been argued, firstly, that royalties in this section ought to be confined to mining

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royalties owing to the collocation of the words "mines, minerals and royalties," and, secondly, that if it has a more extended sense it must not be taken as extending to all *jura regalia* in general and in particular not to bona vacantia. On the first point Lord Selborne observes in delivering the opinion of the Board (1): "It appears to their Lordships to be a fallacy to assume that because the word 'royalties' in this context would not be inofficious or insensible, if it were regarded as having reference to mines and minerals, it ought, therefore, to be limited to those subjects. They see no reason why it should not have its primary and appropriate sense, as to (at all events) all the subjects with which it is here found associated,—lands as well as mines and minerals, even as to mines and minerals it here necessarily signifies rights belonging to the Crown *jure coronae*. . . . Every word ought, *prima facie*, to be construed in its primary and natural sense, unless a secondary or more limited sense is required by the subject or the context. In its primary and natural sense 'royalties' is merely the English translation or equivalent of 'regalitates,' 'ura regalia,' 'jura regia.' . . ." Accordingly the conclusion of the Board was that the word "royalties" and not the word "lands" covered the right of escheat of lands. Lord Selborne proceeded in the same passage as follows: "The subject was discussed with much fullness of learning in *Dyke v. Walford* (2), where a Crown grant of *jura regalia* belonging to the County Palatine of Lancaster was held to pass the right to bona vacantia. That it is a *jus* (said Mr. Ellis in his able argument) is indisputable; it must also be regale; for the Crown holds it generally through England by royal prerogative, and it goes to the successor of the Crown, not to the heir or personal representative of the Sovereign. It stands on the same footing as the right to escheats, to the land between high- and low-water mark, to felons' goods, to treasure-trove and other analogous rights.' With this statement of the law their Lordships agree, and they consider it to have been in substance affirmed by the judgment of Her Majesty in Council in that case."

On examining the opinion delivered in *Dyke v. Walford* (3) by Mr. Pemberton Leigh, their Lordships think that Lord Selborne's expression above quoted, "in substance affirmed,"

(1) 8 App. Cas. 778.

(2) (1846) 5 Moo. P.C. 434.

(3) *Ibid.* 498.

is exact if it be not an understatement. The words under construction were “quaecumque alia libertates et jura regalia ad Comitem Palatinum pertinentia,” and of them the opinion observes (1): “We cannot doubt that the right in question passed to the Duke of Lancaster amongst other ‘jura regalia,’ unless there be something in the grant restricting its effect”—a possibility which Mr. Pemberton Leigh then proceeded to examine and dismiss.

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Lord Selborne, however, finally left the door, if not exactly open, still slightly ajar to the present appellant’s argument by cautiously concluding thus: “Their Lordships are not now called upon to decide whether the word ‘royalties’ in s. 109 of the British North America Act of 1867 extends to other Royal rights besides those connected with ‘lands,’ ‘mines’ and ‘minerals.’ The question is whether it ought to be restrained to rights connected with mines and minerals only, to the exclusion of royalties, such as escheats in respect of lands.”

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In subsequent cases, in which it has been necessary to consider the construction of s. 109, their Lordships’ Board has adopted the exposition above quoted from *Attorney-General of Ontario v. Mercer* (2), and has followed its example in applying the section only so far as was necessary to dispose of the question in issue. In *Attorney-General of British Columbia v. Attorney-General of Canada* (3), their Lordships held that s. 109 had the effect of reserving to the Province of British Columbia any deposits of the precious metals, not as being “mines and minerals,” but as “royalties” connected with them, and this decision has a bearing on the present appeal. To the actual nuggets in the quartz and the particles of fine gold in the auriferous sand the word “royalties” gives the Province a title because of the Crown’s prerogative right to mines of precious metals. If a prospector under licence picked out the nuggets with a jack-knife or washed the gold out with a pannikin and then was found dead and unknown in the wilderness with the gold on his person, is there any presentable reason in the substance of the thing why the same gold, though severed and reduced legitimately into possession, should not equally fall to the Province or rather to the Crown in right of the Province,

(1) (1846) 5 Moo. P.C. 498.

(2) 8 App. Cas. 767.

(3) 14 App. Cas. 295, 305.

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under the royalty, which entitles the Crown to bona vacantia? Again, if the same prospector had fashioned the gold into a ring, a necklace or an armlet, and, having hidden it, had disappeared, would not these ornaments have received the same destination as being treasure-trove? It is not easy to see where the line is to be drawn between precious metals, which it is now decided fall to the Crown in right of the Province as being "royalties" when in the ground, and the same metals when no longer in the ground, whether worked up or not, which in any other collocation of words would be royalties, that is *jura regalia*, also. It should also be noted how closely analogous to bona vacantia is the case of escheats, which also pass under s. 109 as royalties. Except for the difference between a right to lands, the title to which is ultimately in the Crown, and a right to personalty, which is complete in a private person, if there be a private person entitled, the principle on which bona vacantia and escheats fall to the Crown is the same, that is that there being no private person entitled, the Crown takes.

Upon the construction of s. 109 the argument for the Dominion dwells on two points: (1.) That the collocation of "all lands, mines, minerals and royalties" involves that rule of construction, which is called the *ejusdem generis* rule, or, alternatively, that indicated by saying *noscitur a sociis*, so that the word "royalties" must by construction be limited to royalties of a territorial character; and (2.) that all these things thus named must further "belong to" the Province at the time of the Union as a condition of falling to it under the Act. It is true that a common genus may be devised, which would comprehend all four nouns substantive, just because they all possess the quality of belonging to the Crown in right of one of the Provinces at the date of the Union, but they are not brought together as genus and species by any such words as give rise to the niceties of the *ejusdem generis* rule, nor would their possession of this common quality advance the argument on either side in the least degree. The truth is, that they constitute a simple enumeration, that the word "all" applies equally to all four, and that it is in no case limited, except by the words "belonging" to the several Provinces, and the words might equally well have been "all royalties, lands, mines and minerals" or "all royalties, all lands, all

mines and all minerals." It is true that the word "territorial" is (in other contexts) employed in the opinions of the Judicial Committee in several of the earlier cases, but not, as it seems to their Lordships, in a sense which would support the present argument. The other argument, that the word "royalties" here means royalties—*jura regalia*—having something to do with lands or minerals, and so *noscitur a sociis*, appears to beg the question. It was held that precious metals, though not minerals, fall to the Crown in right of the Province, not because they are like minerals, for, except in a legal sense, they are minerals already, but because they are covered by *jura regalia*. If the Legislature, in giving effect to a division between Dominion and Provinces of that complex of rights, which before the Union belonged to the Crown in the right of the various Provinces existing in British North America, chose to enumerate a catalogue of particular rights, which were reserved to the Provinces then included or subsequently to be included under the Dominion, out of the total of the "duties or revenues" which were to form the one consolidated revenue fund to be appropriated for the public service of Canada, it is not for any Court of construction to speculate as to the reasons for this policy so far as to attribute to that, which is expressed as a catalogue, limiting attributes which would convert it into a classification by genus and species. Their Lordships must take the words of s. 109 as they stand, and, as they stand, they enumerate certain Crown rights the benefit of which is to be enjoyed by the Provinces, then existing or under appropriate legislation thereafter brought within the ambit of that benefit, as British Columbia has been. By that enumeration their Lordships, like other Courts, are bound.

A very learned argument upon the words "belonging to" in s. 109 appears to have been addressed to the Courts in Canada, the gist of which was that, in order that British Columbia should be entitled to claim *bona vacantia* under s. 109, it was necessary to show on behalf of the Province that the casual revenues arising from that head of *jura regalia* had prior to 1867 in fact been appropriated by the Government of that Province. On this head considerable research appears to have been made into the despatches passing between the Governors of the Provinces and the Colonial Office. The point became of minor importance

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in the Supreme Court of Canada, and was not relied upon at their Lordships' Bar. Accordingly, without expressing any opinion on the question whether the words "belonging to" mean "already in fact appropriated," or only "such as the Province was entitled to appropriate," their Lordships think it sufficient to observe that this question, which is substantially one of fact, has not been established in favour of the Dominion in the sense of the argument advanced on its behalf, and that the point must be taken to have failed for the purpose of the present appeal.

It was further submitted that if an extended construction be given to the word "royalties" in s. 109, the result would be that "lands, mines, minerals and royalties" would be co-extensive with "revenues and duties" in s. 102, and thus the exception would be as wide as the grant. Formally this is an objection of some weight. Their Lordships may, however, observe that as soon as it is clear that Crown lands and minerals, forests and precious metals, in the Province are to be held by the Crown in right of the Province, any beneficial interest in casual revenue derivable from jura regalia must be of relatively slight importance. They do not, however, propose to decide on this occasion that the words of the reservation in s. 109 are exhaustive of the grant in s. 102. Mindful of the words of Lord Selborne in *Attorney-General of Ontario v. Mercer* (1) that "the general subject of the whole section is of a high political nature," and fully conscious of the fact that, as between the Dominion and the Provinces, the partition of venerable rights, such as the jura regalia of the Crown must always be, is necessarily important far beyond their current pecuniary value, their Lordships propose to follow the guarded course of their predecessors, and to confine the expression of their opinion to bona vacantia, the case in hand. Accordingly, other jura regalia, such as flotsam and jetsam, deodands, swans and sturgeons, bona et catalla felonum and many others must await decision till the case arises, and till then no opinion can be expressed upon the argument that a content is being attributed in the present appeal to the word "royalties" in s. 109 which has the effect of eviscerating the words "duties and revenues" in s. 102.

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(1) 8 App. Cas. 767.

For these reasons their Lordships will humbly advise
His Majesty that this appeal should be dismissed.

Solicitors for appellants: *Gard, Lyell, Betenson & Davidson.*

Solicitors for respondent: *Charles Russell & Co.*

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| ATTORNEY-GENERAL OF BRITISH COLUMBIA..... | } | APPELLANT; |
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AND

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| ATTORNEY-GENERAL OF CANADA..... | } | RESPONDENT. |
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| ATTORNEY-GENERAL FOR ONTARIO..... | } | INTERVENER. |
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ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Customs Duties—Importation of Liquor by Provincial Government—Property of Province—British North America Act, 1867 (30 & 31 Vict. c. 3), s. 91, heads 2, 3; s. 125.

Customs and other duties imposed by the Dominion of Canada upon alcoholic liquors imported into Canada can be levied upon alcoholic liquors imported by the Government of British Columbia for the purpose of sale by it. The power of the Dominion under the British North America Act, 1867, s. 91, heads 2 and 3, to impose duties upon the importation of goods into Canada is not limited by s. 125, which exempts the "property" of a Province from taxation.

Judgment of the Supreme Court of Canada affirmed.

APPEAL (No. 34 of 1923) by special leave from a judgment (October 10, 1922) of the Supreme Court of Canada (1), affirming a judgment (February 25, 1922) of the Court of Exchequer.

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The action was brought by the appellants, who claimed that the Crown, in the right of the Province, was entitled to import goods into Canada from abroad for the purpose of sale in the Province, without liability to pay customs and other duties imposed by the Parliament of Canada in respect of the importation of goods of the kind so imported. The facts appear from the judgment of the Judicial Committee.

The British North America Act, 1867, s. 91, assigns to the Parliament of Canada exclusive legislative power in relation to: (head 2) "the regulation of trade and commerce," (head 3) "the raising of money by any mode or

*Present: VISCOUNT HALDANE, LORD BUCKMASTER, LORD ATKINSON, LORD SHAW, and LORD SUMNER.

system of taxation." Sect. 125 provides: "No land or property belonging to Canada or any Province shall be liable to taxation."

The Court of Exchequer held that the Province was liable to pay the duties, and that judgment was affirmed by the Supreme Court (Davies C.J. and Idington, Duff, Anglin and Mignault JJ.; Brodeur J. dissenting). The proceedings on appeal to the Supreme Court are reported at 64 Can. S.C.R. 377.

1923. June 10, 12. *Farris K.C.* (Attorney-General of British Columbia) and *Hon. Geoffrey Lawrence* for the appellant, contended that the customs duties were "taxation," and relied upon s. 125. [Reference was made to *Smith v. Vermillion Hills Rural Council* (1), and *City of Montreal v. Attorney-General for Canada*. (2)]

Hon. Geoffrey Lawrence for the intervener supported the appellant.

Newcombe K.C. and *T. Mathew* for the respondent. The imposition of duties upon goods imported into Canada is not "taxation" within the meaning of s. 125, but falls within "the regulation of trade and commerce" (head 2 of s. 91); it is also authorized by head 3. The duties are not within the purview of "taxation" as that word is used in s. 125. But in any case s. 125 is not applicable, because the powers given by s. 91 are given "notwithstanding anything in this Act."

Farris K.C. replied.

Oct. 18. The judgment of their Lordships was delivered by

LORD BUCKMASTER. The question raised upon this appeal is whether there is power conferred upon the Dominion Parliament by the British North America Act of 1867 to impose customs duties or excise or sales tax upon goods when they enter the Dominion although they are the property of one of the Provinces. The case arises in the following way:—

The Province of British Columbia in 1921 established Government control and sale of alcoholic liquors by various statutes, enumeration of which is unnecessary. The

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(1) [1916] 2 A.C. 569.

(2) [1923] A.C. 136.

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Dominion Parliament, on the other hand, imposed customs or sales or excise duty upon, among other things, alcoholic liquors imported into the Dominion. In July of 1921 the appellant, acting as duly authorized agent under the British Columbia Liquor Act, purchased in Great Britain in the name and on behalf of His Majesty in right of the Province one case of "Johnny Walker Black Label" whisky, which was duly shipped from Glasgow and consigned to His Majesty in the right of the Province. Upon demand for delivery of this whisky the Collector of Customs, on behalf of the Dominion Government, refused delivery until payment of the customs duty and excise or sales tax. The appellant denied his right to claim these duties, and took the proceedings out of which this appeal has arisen to test his claim. The statutes under which it was claimed the right to impose such duties arose were the following: s. 3 and item A of the Customs Tariff Act, 1907; s. 2, sub-s. 3, of the Customs Act, 1917; s. 19 BBB, sub-s. 1, of the Special War Revenue Act, 1915; and s. 6, sub-s. 1, of the Special War Revenue Act, 1915.

Nothing depends upon the language of these statutes. They admittedly embrace all consignments without distinction of consignee. The question is whether there was power so to legislate.

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The Exchequer Court of Canada dismissed the appellant's claim with costs, and the Supreme Court, by a majority, have supported that judgment. The real issue lies in determining the true meaning to be given to s. 125 of the British North America Act, which provides that "No lands or property belonging to Canada or any Province shall be liable to taxation." Taken alone and read without consideration of the scheme of the statute, this section undoubtedly creates a formidable argument in support of the appellant's case. It is plain, however, that the section cannot be regarded in this isolated and disjunctive way. It is only a part of the general scheme established by the statute with its different allocations of powers and authorities to the Provincial and Dominion Governments. Sect. 91, which assigns powers to the Dominion, provides, among other things, that it shall enjoy exclusive legislative authority over all matters enumerated in the Schedule, included among which are the regulation of trade and commerce and raising of money by any mode or system of

taxation. The imposition of customs duties upon goods imported into any country may have many objects; it may be designed to raise revenue or to regulate trade and commerce by protecting native industries, or it may have the two-fold purpose of attempting to secure both ends; in either case it is a power reserved to the Dominion. It has not indeed been denied that such a general power does exist, but it is said that a breach is created in the tariff wall, which the Dominion has the power to erect, by s. 125, which enables goods of the Province or the Dominion to pass through, unaffected by the duties. But s. 125 cannot, in their Lordships' opinion, be so regarded. It is to be found in a series of sections which, beginning with s. 102, distribute as between the Dominion and the Province certain distinct classes of property, and confer control upon the Province with regard to the part allocated to them. But this does not exclude the operation of Dominion laws made in exercise of the authority conferred by s. 91. The Dominion have the power to regulate trade and commerce throughout the Dominion, and, to the extent to which this power applies, there is no partiality in its operation. Sect. 125 must, therefore, be so considered as to prevent the paramount purpose thus declared from being defeated.

The case is not dissimilar from the case of *Attorney-General of New South Wales v. Collector of Customs, New South Wales* (1), but it is unnecessary to examine whether the reasoning upon which that judgment depends can be made applicable in the present case, because, in their Lordships' view, the true solution is to be found in the adaptation of s. 125 to the whole scheme of Government which the statute defines.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed. In accordance with the usual practice in these cases there will be no order as to costs.

Solicitors for appellant: *Gard, Lyell, Betenson & Davidson.*

Solicitors for respondent: *Charles Russell & Co.*

Solicitors for intervener: *Blake & Redden.*

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| ATTORNEY-GENERAL FOR ONTARIO..... | } | APPELLANT; |
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AND

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| 1924 A.C. p. 328. | ATTORNEY-GENERAL FOR CANADA..... | } | INTERVENER. |
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[AND CONNECTED APPEALS.]

Canada—Legislative Authority—Insurance—Criminal Law—Reciprocal Insurance Act, 1922 (12 & 13 Geo. 5, Ont., c. 62)—Criminal Code (R.S. Can., 1906), s. 508c—Insurance Act (7 & 8 Geo. 5, c. 29, Dom.), ss. 11, 12—British North America Act, 1867 (30 & 31 Vict. c. 3), ss. 91, 92.

The Parliament of Canada cannot, by purporting to create penal sections under s. 91, head 27, of the British North America Act, 1867, appropriate to itself exclusively a field of jurisdiction in which, apart from that procedure, it could exert no legal authority; if, when examined as a whole, legislation in form criminal is found, in aspects and for purposes exclusively within the Provincial sphere, to deal with matters committed to the Provinces, it cannot be upheld as valid.

The Reciprocal Insurance Act, 1922, of Ontario authorized any person to exchange, through the medium of an attorney, with persons, whether in Ontario or elsewhere, reciprocal contracts of insurance, subject to provisions as to licences and other conditions; and it was provided that actions in respect of such contracts might be maintained in the Courts of the Province. A Dominion Act of 1917 inserted in the Criminal Code (R.S. Can. 1906, c. 146), s. 508c, by which it was made an indictable offence for any person to solicit or accept any insurance risk except on behalf of a company or association licensed under the Insurance Act, 1917, of Canada.

In answer to questions referred by the Lieutenant-Governor of Ontario to the Appellate Division:—

Held, (1.) that the Act of 1922 was intra vires the Province, since (a) its provisions were capable of receiving a meaning according to which, whether enabling or prohibitive, they applied only to persons and acts within the territorial jurisdiction of the Province, and (b), although it might incidentally affect aliens and Dominion companies, it did not deal with them as such, but was an Act dealing with contracts of insurance.

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| 1924 A.C. p. 329. | (2.) That the making and carrying out of contracts licensed pursuant to the Act were not rendered illegal, or otherwise affected, by s. 508c of the Criminal Code; that section was invalid, since, in substance though not in form, it was in regulation of contracts of insurance, subjects not within the legislative competence of the Dominion. |
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**Present*: VISCOUNT HALDANE, LORD BUCKMASTER, LORD SHAW, LORD SUMNER, and MR. JUSTICE DUFF.

(3.) That the answers under (1.) and (2.) would be the same if any of the persons subscribing to a reciprocal insurance contract was (a) a British subject not resident in Canada immigrating into Canada, or (b) an alien. In so answering this question no opinion was expressed as to the competence of the Dominion Legislature to enact ss. 11 and 12, sub-s. 1, of the Insurance Act, 1917, whereby restrictions were placed upon aliens and British companies in the matter of carrying on insurance business in Canada; but s. 12, sub-s. 2, was held to be invalid in relation to the subject of immigration.

Attorney-General for Alberta v. Attorney-General for Canada [1916] 1 A.C. 588 and *In re Board of Commerce Act* [1922] 1 A.C. 191 followed.

Judgment of the Appellate Division varied.

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CONSOLIDATED APPEAL (No. 40 of 1923) by special leave from a judgment (1) of the Supreme Court of Ontario, Appellate Division (December 29, 1922), upon a reference by the Lieutenant-Governor of Ontario, pursuant to c. 85 of R.S. Ont. 1914, and upon cases reserved for the opinion of that Court by a police magistrate.

The main appeal was from the judgment of the appellate Division in answer to three questions referred as above stated, relative to the validity of the Reciprocal Insurance Act, 1922 (12 & 13 Geo. 5, Ont.), and whether the making and carrying out of reciprocal insurance contracts licensed under that Act were rendered illegal by s. 508c added to the Criminal Code of Canada by 7 & 8 Geo. 5, c. 29 (Dom.). The questions are set out in full at the beginning of the judgment of the Judicial Committee.

The appellants in the two connected appeals, Craigon and Otte, were each convicted by a police magistrate of the City of Toronto, Ontario, with indictable offences under s. 508c of the Criminal Code—namely, soliciting insurance risks, and carrying on the business of insurance, on behalf of persons acting under a reciprocal insurance agreement without being licensed as required by the section. Craigon was a British subject and Otte an alien, both being resident in Toronto. The police magistrate stated cases for the opinion of the Court under s. 1014 of the Criminal Code of Canada, reserving in each case the following question: "Are s. 508c of the Criminal Code and ss. 4 and 11 of the Insurance Act, 1917, or any of them, in so far as they purport to render illegal the acts complained of in the above charge *intra vires* of the Parliament of Canada?"

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The provisions of the material enactments appear from the judgment of the Judicial Committee.

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The reference and the cases stated were heard together by the Appellate Division, consisting of the Chief Justice of Ontario with Maclaren, Magee, Masten and Ferguson JJ. Judgments were delivered on December 29, 1922, and are reported at 53 Ont. L.R. 195.

On the first question the Chief Justice, Maclaren J. and Magee J., were of opinion that the Act of 1922 was valid save so far as it purported to authorize the making of contracts outside Ontario, or to insure property outside Ontario, and save so far as it authorized aliens to make such contracts. Masten and Ferguson JJ. answered the question in the negative.

The second question was answered by the Chief Justice and Maclaren J. in the affirmative so far as it related to companies and persons prohibited by ss. 11 and 12 of the Insurance Act, 1917, of Canada. Masten and Ferguson JJ. answered it in the affirmative without qualification.

All the judges considered that an answer to the third question was not necessary in view of their answers to the other two questions.

The question submitted by the cases stated was answered by all the learned judges in the affirmative.

1923. July 17, 19, 20. *Hon. Geoffrey Lawrence* and *Evan Gray* for the appellant, the Attorney-General for Ontario.

F. W. Wegenast and *T. Moss* for the respondent Reciprocal Insurers, and for *Craigon* and *Otte*, appellants in the connected appeals.

A. W. Anglin K.C. for the Canadian Underwriters' Association, respondents.

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p. 331. *Newcombe K.C.* for the Attorney-General for Canada, intervener, and for the Crown, respondent in the connected appeals.

[Reference was made to the provisions of the Reciprocal Insurance Act, 1922 (12 & 13 Geo. 5, c. 62, Ont.) generally, to the Insurance Act, 1917 (7 & 8 Geo. 5, c. 29), ss. 4, 11, 12, and other sections, and to *Attorney-General for Canada v.*

Attorney-General for Alberta (1); *Attorney-General for Ontario v. Attorney-General for Canada* (2); *In re Board of Commerce Act* (3); *John Deere Plow Co. v. Wharton* (4); *Union Colliery Co. v. Bryden* (5); and *Cunningham v. Tomey Homma*. (6)]

Jan. 25. The judgment of their Lordships was delivered by

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MR. JUSTICE DUFF. Availing himself of the provisions of the Provincial statute, c. 85 of R.S. Ont., 1914, the Lieutenant-Governor of Ontario on May 10, 1922, referred to the Appellate Division of the Supreme Court of Ontario three separate questions in the following terms:—

“Question One.—Is it within the legislative competence of the Legislature of the Province of Ontario to regulate or license the making of reciprocal contracts by such legislation as that embodied in the Reciprocal Insurance Act, 1922?

“Question Two.—Would the making or carrying out of reciprocal insurance contracts licensed pursuant to the Reciprocal Insurance Act, 1922, be rendered illegal or otherwise affected by the provisions of ss. 508c and 508d of the Criminal Code as enacted by c. 26 of the Statutes of Canada 7 & 8 Geo. 5, in the absence of a licence from the Minister of Finance issued pursuant to s. 4 of the Insurance Act of Canada 7 & 8 Geo. 5, c. 29?

“Question Three.—Would the answers to questions one or two be affected, and if so how, if one or more of the persons subscribing to such reciprocal insurance contracts is: (A) A British subject not resident in Canada immigrating into Canada? (B) An alien?”

The two Dominion statutes mentioned in the second of these queries were passed on the same day, September 20, 1917 (7 & 8 Geo. 5, c. 29), one entitled the Insurance Act, 1917, and the other (7 & 8 Geo. 5, c. 26), entitled an Act to Amend the Criminal Code respecting insurance. The question whether the first section of the last-mentioned of them, a section professing to bring into force an amendment of the Criminal Code designated as s. 508c. was competently enacted, is the most important question with which their Lordships are concerned on this appeal, and it will be

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(1) [1916] 1 A.C. 588.
(2) [1916] 1 A.C. 598.
(3) [1922] 1 A.C. 191, 198.

(4) [1915] A.C. 330, 339, 340.
(5) [1899] A.C. 580.
(6) [1903] A.C. 151.

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convenient to discuss that question first. It was answered in the affirmative by the Appellate Division.

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These two statutes, which are complementary parts of a single legislative plan, are admittedly an attempt to produce by a different legislative procedure the results aimed at by the authors of the Insurance Act of 1910, which in *Attorney-General for Canada v. Attorney-General for Alberta* (1) was pronounced ultra vires of the Dominion Parliament.

The Insurance Act of 1917 empowers the Minister of Finance to grant licences to companies, authorizing them to carry on in Canada the business of insurance, except marine insurance, subject to the provisions of the statute and to the terms of the licence. Any company, other than a company already incorporated under the authority of the Dominion Parliament, when licensed under the statute, becomes, and is deemed to be, a company incorporated under the laws of Canada. The Minister is also authorized to grant licences to associations of individuals formed upon the plan known as Lloyd's and to associations formed for the purpose of exchanging reciprocal contracts of indemnity upon the plan known as inter-insurance; and in such cases all the provisions and requirements of the statute regulating the business of licensed companies are deemed, so far as applicable, to be terms and conditions of the licence. No provision is made by the statute for licensing individuals or for licensing firms or unincorporated associations other than those falling within the two classes just mentioned.

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The enactments of the statute include provisions touching the requirements with which applicants for licences must comply, the terms of licences, the conditions of their cancellation and suspension, and a comprehensive system of regulations controlling licences in relation to the form and terms of contracts of insurance and the business of insurance generally, including (inter alia) regulations governing the salaries, allowances and commissions of directors and agents, and the investment of the funds of such companies; to all of which provisions, in so far as applicable, unincorporated associations of the two classes above mentioned, that have received licences, are subject.

(1) [1916] 1 A.C. 588.

In the Insurance Act itself there is no enactment of general application requiring persons carrying on the business of insurance to become licensed under it. Provisions of limited application upon the subject are found in ss. 11 and 12. By s. 11 it is declared to be unlawful for any Dominion company or for any alien, whether a natural person or foreign company, to solicit or accept any risk, to issue or deliver any receipt or policy of insurance, to carry on any business of insurance or to do any of a number of other acts therein enumerated in relation to any such business unless licensed under the Act; and by s. 12 it is declared to be unlawful for any British company or for any British subject not resident in Canada to immigrate into Canada for the purpose of opening or establishing any office or agency for the transaction of any business of or relating to insurance, or doing any of the acts declared to be unlawful by s. 11. Penalties are imposed, for example by ss. 84 and 187, in respect of infringements of the Act.

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Broadly speaking, therefore, under the Insurance Act any company, whether British, foreign or Canadian, incorporated for the purpose of carrying on the business of insurance, and any unincorporated association falling within either of the two classes mentioned, may become licensed upon observing the requirements of the Act, and as licensees such company thereupon becomes subject to the provisions of the Act, which, as regards such licensees, receive obligatory force by virtue of the penal clauses already referred to and of the liability of licences to cancellation for non-observance of statutory requirements. But the provisions of the statute contain nothing making it compulsory for any private individual or any unincorporated firm or association to become licensed as a condition of lawfully carrying on or transacting any business of insurance.

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It is obvious that, in the absence of some such compulsory enactment, directed against such individuals and unincorporated bodies, the scheme of regulation embodied in the Insurance Act could only be incompletely effectual, and accordingly the authors of the legislation resorted to the expedient of bringing the necessary prohibitions and penalties into force in the form of an amendment to the Criminal Code. That amendment, which is designated as s. 508c of the Criminal Code, is in the following words:

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“(1.) Everyone shall be guilty of an indictable offence who, within Canada, except on behalf or as agent for a company thereunto duly licensed by the Minister of Finance or on behalf of or as agent for or as a member of an association of individuals formed upon the plan known as Lloyd’s or of an association of persons formed for the purpose of inter-insurance and so licensed solicits or accepts any insurance risk, or issues or delivers any interim receipt or policy of insurance, or grants in consideration of any premium or payment any annuity on a life or lives, or collects or receives any premium for insurance, or carries on any business of insurance or inspects any risk, or adjusts any loss, or prosecutes or maintains any suit, action or proceeding, or files any claim in insolvency relating to such business, or receives directly or indirectly any remuneration for doing any of the aforesaid acts.

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(2.) Anyone convicted of any such offence shall for a first offence be liable to a penalty of not more than fifty dollars or less than twenty dollars, and in default of payment, to imprisonment with or without hard labour for a term of not more than three months or less than one month, and for a second or any subsequent offence to a penalty of not more than one hundred dollars or less than fifty dollars, and, in addition thereto to imprisonment with hard labour for a period of not more than six months or less than three months.

(3.) All information or complaints for any of the aforesaid offences shall be laid or made within one year after the commission of the offence.

(4.) One-half of any pecuniary penalty mentioned in this section shall, when recovered, belong to His Majesty, and the other half thereof to the informer.

Provided that nothing in this section contained shall be deemed to prohibit or affect or to impose any penalty for doing any of the acts in this section described: (A) By or on behalf of a company incorporated under the laws of any Province of Canada for the purpose of carrying on the business of insurance. (B) By or on behalf of any society or association of persons thereunto specially authorized by the Minister of Finance or the Treasury Board. (c) In respect of any policy or risk of life insurance issued or undertaken on or before the thirtieth day of March, one

thousand eight hundred and seventy-eight, by or on behalf of any company which has not since the last-mentioned date received a licence from the Minister of Finance. (D) In respect of any policy of life insurance issued by an unlicensed company to a person not resident in Canada at the time of the issue of such policy. (E) In respect of the insurance of property situated in Canada with any British or foreign unlicensed insurance company or underwriters, or with persons who reciprocally insure for protection and not for profit, or the inspection of the property so insured, or the adjustment of any loss incurred in respect thereof if the insurance is effected outside of Canada without any solicitations whatsoever directly or indirectly on the part of the company, underwriters or persons by which or by whom the insurance is made. (F) Solely in respect of marine or inland marine insurance. (G) In respect of any contract entered into or any certificate of membership or policy of insurance issued, before the twentieth day of July, one thousand eight hundred and eighty-five by any assessment life insurance company."

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It will be observed that by force of para. (A) of the proviso, Provincial incorporated companies are under no disability. Prohibited acts, though criminal offences when done by an individual on behalf of himself or of an unlicensed unincorporated association or on behalf of an unlicensed company other than a Provincial company, are treated as innocent when done on behalf of a Provincial company, or (in virtue of para. (B)) when done on behalf of a society or association under the special authority of the Minister of Finance or of the Treasury Board. Such acts, by force of para. (F), are likewise innocent when done solely in respect of marine insurance. Subject to these exceptions (the remaining paragraphs of the proviso are of no relevancy) the effect of the enactment, briefly summarized, is that anybody who does, in Canada, any of the acts enumerated, is guilty of an indictable offence unless he is acting on behalf of a company licensed under the Insurance Act or on behalf of or as a member of an association so licensed; and the necessary consequence is that, subject, of course, to the same exceptions, if the enactment be legally operative, contracts of insurance, if lawfully effected, and any business of insurance, if lawfully transacted, are brought, after the passing of the Act, under the dominion of the system of

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regulations governing licensees under the Insurance Act; and to that extent withdrawn from Provincial control.

In *Attorney-General for Canada v. Attorney-General for Alberta* (1), it was decided by this Board that it was not competent to the Dominion to regulate generally the business of insurance in such a way as to interfere with the exercise of civil rights in the Provinces.

The provisions relating to licences in the Insurance Act of 1910, which by this judgment was declared to be ultra vires, and the regulations governing licences under the Act and applicable to contracts and to the business of insurance, did not, in any respect presently material, substantially differ from those now found in the legislation of 1917; but the provisions of the statute of 1910 derived their coercive force from penalties created by the Insurance Act itself.

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The distinction between the legislation of 1910 and that of 1917, upon which the major contention of the Dominion is founded, consists in the fact that s. 508c is enacted in the form of an amendment to the statutory criminal law, and purports only to create offences which are declared to be indictable, and to ordain penalties for such offences. The question now to be decided is whether, in the frame in which this legislation of 1917 is cast, that part of it which is so enacted can receive effect as a lawful exercise of the legislative authority of the Parliament of Canada in relation to the criminal law. It has been formally laid down in judgments of this Board, that in such an inquiry the Courts must ascertain the "true nature and character" of the enactment: *Citizens' Insurance Co. v. Parsons* (2); its "pith and substance": *Union Colliery Co. v. Bryden* (3); and it is the result of this investigation, not the form alone, which the statute may have assumed under the hand of the draughtsman, that will determine within which of the categories of subject matters mentioned in ss. 91 and 92 the legislation falls; and for this purpose the legislation must be "scrutinised in its entirety": *Great West Saddlery Co. v. The King*. (4) Of course, where there is an absolute jurisdiction vested in a Legislature, the laws promulgated by it must take effect according to the proper construction

(1) [1916] 1 A.C. 588.

(2) (1881) 7 App. Cas. 96.

(3) [1899] A.C. 580.

(4) [1921] 2 A.C. 91, 117.

of the language in which they are expressed. But where the law-making authority is of a limited or qualified character, obviously it may be necessary to examine with some strictness the substance of the legislation for the purpose of determining what it is that the Legislature is really doing. Upon this principle the Board proceeded in 1878, in *Attorney-General for Quebec v. Queen Insurance Co.* (1), where a statute of Quebec (39 Vict. c. 7), which took the form of a licensing Act, enacted under the authority of s. 92, head 9, of the British North America Act, was held to be in its true character a Stamp Act and an attempt to impose a tax which was an indirect tax, in contravention of the limitation to which the Provincial powers of taxation are subject under the second head of that section. The principle is recognized in *Russell v. The Queen* (2), and in *Citizens' Insurance Co. v. Parsons* (3), and in 1899, conformably to this doctrine, it was held, in the well-known case of *Union Colliery Co. v. Bryden* (4), that a statutory regulation, professedly passed for governing the working of coal mines, which admittedly "might be regarded as establishing a regulation applicable" to the working of such mines, and which, "if that were an exclusive description of the substance of it," was within the competency of the Provincial Legislature by virtue either of s. 92, No. 10, or s. 92, No. 13, must be classed, its "true character," its "pith and substance" being ascertained, as legislation in relation to the subject of "aliens and naturalisation," a subject exclusively within the Dominion sphere of action. The general doctrine was later applied in *John Deere Plow Co. v. Wharton* (5), and again in *Great West Saddlery Co. v. The King* (6).

A judgment of the Supreme Court of the United States delivered in 1918 in *Hammer v. Dagenhat* (7) illustrates the operation of the principle. By the Constitution of the United States the regulation of Commerce between the States is committed to Congress, and this authority, it was decided in a series of decisions of the Supreme Court,

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(1) (1878) 3 App. Cas. 1090.

(2) (1882) 7 App. Cas. 829.

(3) 7 App. Cas. 96.

(4) [1899] A.C. 580.

(5) [1915] A.C. 330.

(6) [1921] 2 A.C. 91, 117.

(7) (1918) 247 U. S. 251.

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includes the power to prohibit the transmission, through the channels of inter-State commerce, of any particular class of articles of commerce. The statute of Congress, which the Supreme Court had to consider in the case mentioned, prohibited "the transportation in inter-State commerce" of manufactured goods the product of a factory in which within thirty days prior to their removal therefrom children of certain specified ages had been employed or permitted to work. The authority to enact this statute was rested upon the grounds that the power of Congress in relation to inter-State commerce is an unqualified power, including, as already mentioned, the authority to prohibit the transport of any articles of any description whatever in inter-State commerce, and that, the legislation impugned, being *ex facie* within the terms of the power, it was not competent to any judicial tribunal to inquire into the purpose, or the ultimate or collateral effects, of the enactment. In the course of the judgment delivered by Day J., on behalf of the majority of the Court, holding that the statute could not be supported as legislation regulating inter-State commerce within the true intendment of "the commerce clause," it is said: "A statute must be judged by its natural and reasonable effect. . . . We have neither authority nor disposition to question the motives of Congress in enacting this legislation. The purposes intended must be attained consistently with constitutional limitations and not by an invasion of the powers of the States. This Court has no more important function than that which devolves upon it, the obligation to preserve inviolate the constitutional limitations upon the exercise of authority, Federal and State, to the end that each may continue to discharge, harmoniously with the other, the duties entrusted to it by the Constitution. In our view the necessary effect of this act is, by means of a prohibition against the movement in inter-State commerce of ordinary commercial commodities, to regulate the hours of labour of children in factories and mines within the States, a purely State authority. . . . The far-reaching result of upholding the act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in inter-State commerce, all freedom of commerce will be at an end, and the power of the State

over local matters may be eliminated, and thus our system of Government be practically destroyed."

It is not seriously disputed that the purpose and effect of the amendment in question are to give compulsory force to the regulative measures of the Insurance Act, and their Lordships think it not open to controversy that in purpose and effect s. 508c is a measure regulating the exercise of civil rights. But, on behalf of the Dominion, it is argued that, although such be the true character of the legislation, the jurisdiction of Parliament, in relation to the criminal law, is unlimited, in the sense, that in execution of its powers over that subject matter, the Dominion has authority to declare any act a crime, either in itself or by reference to the manner or the conditions in which the act is done, and consequently that s. 508c, being by its terms limited to the creation of criminal offences, falls within the jurisdiction of the Dominion.

The power which this argument attributes to the Dominion is, of course, a far-reaching one. Indeed, the claim now advanced is nothing less than this, that the Parliament of Canada can assume exclusive control over the exercise of any class of civil rights within the Provinces, in respect of which exclusive jurisdiction is given to the Provinces under s. 92, by the device of declaring those persons to be guilty of a criminal offence who in the exercise of such rights do not observe the conditions imposed by the Dominion. Obviously the principle contended for ascribes to the Dominion the power, in execution of its authority under s. 91, head 27, to promulgate and to enforce regulations controlling such matters as, for example, the solemnization of marriage, the practice of the learned professions and other occupations, municipal institutions, the operation of local works and undertakings, the incorporation of companies with exclusively Provincial objects—and superseding Provincial authority in relation thereto. Indeed, it would be difficult to assign limits to the measure in which, by a procedure strictly analogous to that followed in this instance, the Dominion might dictate the working of Provincial institutions, and circumscribe or supersede the legislative and administrative authority of the Provinces.

Such a procedure cannot, their Lordships think, be justified, consistently with the governing principles of the Canadian Constitution, as enunciated and established by

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the judgments of this Board. The language of ss. 91 and 92 (which establish "interlacing and independent legislative authorities," *Great West Saddlery Co. v. The King* (1)) being popular rather than scientific, the necessity was recognized, at an early date, of construing the words describing a particular subject matter by reference to the other parts of both sections. As Sir Montague Smith observed, in a well-known passage in the judgment in *Citizens' Insurance Co. v. Parsons* (2), "The two sections must be read together, and the language of one interpreted, and, where necessary, modified, by that of the other." The scope of the powers received by the Dominion under head 27, s. 91, is not to be ascertained by obliterating the context, in which the words are placed, in disregard of this rule. It will be sufficient to refer briefly to one or two of the cases which illustrate this.

Her Majesty in Council, in 1885, referred to the Judicial Committee the question of the competence of the Canadian Parliament to pass a statute of 1883 known as the Liquor Licence Act. That Act, by its preamble, recited that it was desirable to regulate the traffic in the sale of intoxicating liquors, and that it was expedient that provision should be made in regard thereto, "for the better preservation of peace and order." The statute provided for a licensing system, and prohibited, among other things, the sale of liquor by unlicensed persons, and imposed penalties by way of fine and imprisonment, including, as the penalty for a second or subsequent offence, imprisonment at hard labour in the common jail. In the course of the argument the view was advanced that the statute could be regarded as an exercise of the jurisdiction of the Dominion in relation to the criminal law; nevertheless the statute was held to be ultra vires as a whole. The Insurance Act of 1910, s. 70, imposed penalties still more stringent upon persons infringing the prohibition of s. 4 against engaging in the business of insurance without first obtaining a licence under the Act. The penal provisions of the statute were appealed to, on the argument before this Board in *Attorney-General for Alberta v. Attorney-General for Canada* (3), as imparting to it the character of criminal law within the meaning of s. 91: the

(1) [1921] 2 A.C. 91.

(2) 7 App. Cas. 96, 109.

(3) [1916] 1 A.C. 588.

contention was rejected. Again, in 1922, the question of the authority of the Parliament of Canada to enact certain sections of the Combines and Fair Prices Act (9 & 10 Geo. 5, c. 45) came before the Board in *In re Board of Commerce Act* (1), and the Board had to consider whether s. 22 of the Act had the effect of bringing the provisions in question under the denomination of criminal law. That section expressly declared that contravention of the Act should be an indictable offence, punishable, upon indictment or summary conviction, by fine or imprisonment, or both; and their Lordships, by their judgment, laid it down that it was not competent to the Dominion Parliament "to interfere with a class of subject committed exclusively to the Provincial Legislatures and then to justify this by enacting ancillary provisions designated as new phases of Dominion criminal law, which require a title to so interfere as the basis of their application." Indeed, on any other hypothesis, the greater part of the judgment in *Russell v. The Queen* (2) would be quite beside the question then before the Board, a remark which would equally apply to the elaborate judgment delivered by Lord Watson on the local option reference, reported under the title *Attorney-General for Ontario v. Attorney-General for the Dominion* (3), and to the lengthy arguments to which the Board listened on the hearing of that appeal. In accordance with the principle inherent in these decisions their Lordships think it is no longer open to dispute that the Parliament of Canada cannot, by purporting to create penal sanctions under s. 91, head 27, appropriate to itself exclusively a field of jurisdiction in which, apart from such a procedure, it could exert no legal authority, and that if, when examined as a whole, legislation in form criminal is found, in aspects and for purposes exclusively within the Provincial sphere, to deal with matters committed to the Provinces, it cannot be upheld as valid. And indeed, to hold otherwise would be incompatible with an essential principle of the Confederation scheme, the object of which, as Lord Watson said in *Maritime Bank of Canada v. Receiver-General of New Brunswick* (4), was "not to weld the Provinces into one or to subordinate the Provincial Governments to a central authority." "Within the spheres allotted to them

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(1) [1922] 1 A.C. 191.
(2) 7 App. Cas. 829.

(3) [1896] A.C. 348.
(4) [1892] A.C. 437, 441.

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by the Act the Dominion and the Provinces are," as Lord Haldane said in *Great West Saddlery Co. v. The King* (1), "rendered in general principle co-ordinate Governments."

Their Lordships think it undesirable to attempt to define, however generally, the limits of Dominion jurisdiction under head 27 of s. 91; but they think it proper to observe, that what has been said above does not involve any denial of the authority of the Dominion Parliament to create offences merely because the legislation deals with matters which, in another aspect, may fall under one or more of the sub-divisions of the jurisdiction entrusted to the Provinces. It is one thing, for example, to declare corruption in municipal elections, or negligence of a given order in the management of railway trains, to be a criminal offence and punishable under the Criminal Code; it is another thing to make use of the machinery of the criminal law for the purpose of assuming control of municipal corporations or of Provincial railways.

Their Lordships now turn to the examination of the question arising on the first of the interrogatories submitted to the Appellate Division, which concerns the validity of legislation of the character of the Ontario Act (12 & 13 Geo. 5, c. 62) therein mentioned, which by its terms is only to come into force on proclamation to that effect by the Lieutenant-Governor in Council. This Act, as its name imports, is a statute dealing with reciprocal contracts of insurance. The practice of forming groups, for the purpose of exchanging such contracts of insurance, appears to have originated in the United States and to prevail widely there and in Canada. Such groups, described as exchanges in the Act, are usually composed of persons having some common interest, as owners of a particular class of property, for example, or dealers in the same kinds of commodities. The contracts are effected, and the business incidental to them transacted, through the agency of an attorney, who is empowered by each subscriber individually to act for him in making such contracts with other members of the exchange. The exchange, as a whole, undertakes no obligation, the attorney, who receives a commission for his services, in every case acting for the subscriber as an

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individual, and the obligation of the subscriber being his own individual obligation.

At the date on which the statute of 1922 was assented to, there were, by virtue of the Ontario Insurance Act (R.S. Ont., c. 183), certain prohibitions in force in Ontario which are qualified by that statute. By s. 98 of the Ontario Insurance Act, the transacting or undertaking of insurance (other than guarantee insurance by certain companies), except by a corporation duly registered under s. 66 of that Act, was forbidden, and a penalty was imposed on every person contravening this prohibition. Sects. 3 and 4 of the statute of 1922 limit the scope of the prohibition by enacting, first, that it shall be lawful for any person to exchange with other persons, in Ontario or elsewhere, reciprocal contracts of indemnity or inter-insurance, and that no person shall be deemed to be an insurer, within the meaning of the Ontario Insurance Act, by reason of exchanging such contracts with other persons under the provisions of the Act. The making of reciprocal contracts of indemnity or inter-insurance, through an attorney as intermediary, is expressly sanctioned by s. 5. And, by ss. 6 and 7, the Superintendent of Insurance is empowered, upon fulfilment of specified conditions, to grant licences to exchanges, each of which is required to maintain a reserve of specified amount in the hands of its attorney. By s. 14 anyone is forbidden to act as an attorney in the exchange of such contracts, except under the sanction of a licence issued under the Act. And, by s. 15, authority is given for the cancellation or revocation of such licences, for non-fulfilment of the statutory conditions.

It is alleged, upon two grounds, that this statute is illegal. It is said, first, that it is extra-territorial in its operation; and, secondly, that it assumes to deal with subjects not assigned to the Provinces, the subject of aliens and that of Dominion companies. Their Lordships find nothing in the language of the statute which necessarily gives to its enactments an extra-territorial effect. The enabling provisions of ss. 3 and 4 appear to be designed to exempt the transactions to which they relate from the above-mentioned prohibitions of the Ontario Insurance Act, and the terms of the statute as a whole are, in their Lordships' judgment, capable of receiving a meaning according to which its provisions, whether enabling or prohibitive, apply only to persons and acts within the territorial jurisdiction

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of the Province. In their opinion it ought to be interpreted in consonance with the presumption which imputes to the Legislature an intention of limiting the direct operation of its enactments to such persons and acts.

As to the second ground of attack, it is only necessary to observe that contracts of insurance form the subject of the statute, a subject peculiarly within the sphere of Provincial control. It is true that its provisions may incidentally affect aliens and Dominion companies who are, or may wish to become, subscribers to an inter-insurance exchange; it is nevertheless not a statute in relation to aliens, as such, or Dominion companies as such. It is unnecessary and undesirable to attempt to say how far, if at all, the Dominion in execution of its powers in relation to the subjects of aliens and Dominion companies may dictate the rules governing contracts of insurance, to which an alien or a Dominion company may be a party. Nothing in s. 91 of the British North America Act, in itself, removes either aliens or Dominion companies from the circle of action which the Act has traced out for the Provinces. Provincial statutes of general operation on the subject of civil rights *prima facie* affect them. It may be assumed that legislation touching the rights and disabilities of aliens or Dominion companies might be validly enacted by the Dominion in some respects conflicting with the Ontario statute, and that in such cases the provisions of the Ontario statute, where inconsistent with the Dominion law, would to that extent become legally ineffective; but this, as their Lordships have before observed, is no ground for holding that the Provincial legislation, relating as it does to a subject matter within the authority of the Province, is wholly illegal or inoperative: *McColl v. Canadian Pacific Ry. Co.* (1)

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It follows from what has been said that the answer to the first question is in the affirmative, and the answer to the second, in the negative. The provisions of s. 508D have not been specifically referred to, since they do not in their terms purport to prohibit, even upon conditions, the making of the contracts described in the question, and the reference to that section, their Lordships were informed on the argument, was inserted in the question by mistake.

(1) [1923] A.C. 126, 135.

In view of the terms of the third question it is necessary to notice a contention of the respondents that s. 508c can receive a limited effect as applying to aliens within the meaning of s. 11 (b) of the Insurance Act, 1917, and to companies and natural persons not aliens immigrating into Canada within the meaning of s. 12, and a parallel contention as to the effect of ss. 11 and 12.

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The enactment in question being in substance, notwithstanding its form, an enactment in regulation of contracts of insurance and the business of insurance, subjects not within the legislative sphere of the Dominion, and, subject to the proviso which is not here material, being general in its terms, is in their Lordships' opinion invalid in its entirety. Assuming that it would be competent to the Dominion Parliament, under its jurisdiction over the subject of aliens, to pass legislation expressed in similar terms, but limited in its operation to aliens, their Lordships think it too clear for discussion that s. 508c is not an enactment on the subject of aliens (just as the Ontario statute of 1922 is not an enactment on that subject); and that the language of the clause in question cannot be so read as to effect by construction such a limitation of its scope. Such a result could only be accomplished by introducing qualifying phrases, indeed, by rewriting the clause and transforming it into one to which the Legislature has not given its assent.

It follows that the third question must be answered in the negative, but with this qualification, that, in so answering it their Lordships do not express any opinion as to the competence of the Dominion Parliament, by virtue of its authority in relation to aliens and to trade and commerce, to enact ss. 11 and 12, sub-s. 1, of the Insurance Act. This, although referred to on the argument before their Lordships' Board, was not fully discussed, and since it is not directly raised by the question submitted, their Lordships, as they then intimated, consider it inadvisable to express any opinion upon it. Their Lordships think it sufficient to recall the observation of Lord Haldane, in delivering the judgment of the Board in *Attorney-General for Canada v. Attorney-General for Alberta* (1), to the effect that legislation, if properly framed, requiring aliens, whether natural persons or foreign companies, to become licensed, as a condition of

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carrying on the business of insurance in Canada, might be competently enacted by Parliament (an observation which, it may be added, applies also to Dominion companies), and to remark that the second sub-section of s. 12 ascribes an inadmissible meaning to the word "immigrate," which, if governing the interpretation of sub-s. 1, would extend the scope of s. 12 to matters obviously not comprised within the subject of immigration; and that sub-s. 2 is therefore not competently enacted under the authority of the Dominion in relation to that subject. Their Lordships do not think it proper to discuss the limits of that authority, or to intimate any opinion upon the point whether any, or, if any, what effect can be given to the first sub-section of s. 12 as an enactment passed in exercise of it.

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It is unnecessary to say more upon the subject of the appeal of the Attorney-General, but the appeals by Adam Craigon and Ellis Elliott Otte must be mentioned. These two appellants were, each of them, convicted of two several offences under s. 508c of the Criminal Code. The charges were laid as the result of a suggestion which arose when the reference first came on for hearing before the Appellate Division, that the questions submitted could be more conveniently dealt with, if concrete cases involving those questions were at the same time before the Court. Facts having been admitted before the magistrate establishing in each case the offence charged, and the defendants having been found guilty, the magistrate reserved for the opinion of the Divisional Court the question of the constitutional validity of s. 508c. This question was answered conformably to the opinions given in answer to the second question submitted under the reference. The Attorney-General of Canada was no party to these prosecutions, which were initiated in response to the suggestion above mentioned, and with the purpose of facilitating the consideration of those questions.

On March 27, 1923, special leave to appeal to His Majesty in Council from the judgment of the Appellate Division on the reference was granted on the application of the Attorney-General for Ontario, and in order that their Lordships might be in possession of all the materials before the Appellate Division, leave to appeal from the judgment of the Appellate Division on the cases stated by the magistrate was at the same time given, and all these appeals were consolidated.

In view of the circumstances in which the charges were laid and the convictions obtained, it is, their Lordships conceive, unnecessary to make any disposition of these appeals, and their Lordships will at present tender to His Majesty no advice concerning them.

It must, moreover, be understood that in the special circumstances the order of their Lordships granting special leave to appeal to these last-named appellants involved no decision as to the power of the Parliament of Canada to enact s. 1025 of the Criminal Code, or as to the meaning and effect of that section; whether or not, for example, it would, if effectively enacted, constitute a bar to an appeal from a conviction for an offence created by a statute alleged to be ultra vires. And on neither of these points do their Lordships give any opinion.

Their Lordships will humbly advise His Majesty to discharge the order of the Appellate Division of December 29, 1922, in so far as it sets forth the answers of that Court to the three questions submitted by the Order in Council of May 10, 1922; and to substitute therefor the several answers to the said questions which have been already indicated. There will be no costs of this appeal.

Solicitors for appellants: *Blake & Redden.*

Solicitors for the respondents, the Canadian Fire Underwriters' Association: *Lawrence Jones & Co.*

Solicitors for Attorney-General for Canada: *Charles Russell & Co.*

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[PRIVY COUNCIL.]

Aug. 1.

CARON..... APPELLANT;

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AND

THE KING..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Legislative Power—Dominion Taxation—Income Tax—Salary of Minister of Provincial Governments—British North America Act, 1867 (30 & 31 Vict. c. 3), s. 91, sub-s. 3; s. 92, sub-ss. 2, 4—Income War Tax Act, 1917 (7 & 8 Geo. 5, c. 28, Dom.), ss. 3, 4—Income War Tax Amendment Act, 1919 (9 & 10 Geo. 5, c. 55, Dom.), s. 2, sub-s. 1.

The Parliament of Canada had power under s. 91, head 3, of the British North America Act, 1867, to enact the Income War Tax Act, 1917, and the amending Act of 1919, whereby every person residing, or ordinarily residing, or carrying on business in Canada is rendered liable to pay income tax; and a minister of the Government of a Province is liable under the Acts in respect of the salary and sessional indemnity payable to him under statutes of the Province.

Abbott v. City of St. John (1908) 40 Can. S. C. R. 597 approved.

Judgment of the Supreme Court affirmed.

APPEAL (No. 75 of 1922) by special leave from a judgment of the Supreme Court of Canada (May 17, 1922) affirming a judgment of the Exchequer Court.

The action giving rise to the appeal was brought by the Crown, on the information of the Attorney-General for Canada, to recover from the appellant the sum of Rs. 210 as income tax due for the year 1917 under the Income War Tax Act, 1917 (7 & 8 Geo. 5, c. 28, Dom.), and amending Acts.

The question to be decided was whether the above Acts were ultra vires, either in their entirety, or so far as they purported to render the appellant liable to assessment for income tax in respect of the salary payable to him under art. 574 of R. S. Q., 1909, as Minister of Agriculture in the Government of the Province of Quebec, and the sessional indemnity payable to him under art. 154 as a member of the Legislative Assembly of Quebec.

The action was tried in the Exchequer Court by Audette, J., who gave judgment for the Crown.

* *Present:* VISCOUNT CAVE, LORD PHILLIMORE, LORD BLANESBURGH, and Sir ADRIAN KNOX.

An appeal to the Supreme Court of Canada was dismissed. The learned judges (Sir Louis Davies, C.J., and Idington, Duff, Anglin, Brodeur and Mignault JJ.) considered that they were bound by the decision of that Court in *Abbott v. City of St. John*. (1)

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1924. July 15. *Sir John Simon K.C., St. Laurent K.C. and Hon. Geoffrey Lawrence* for the appellant. Under the British North America Act, 1867, the appellant was immune from Dominion taxation in respect of his salary and indemnity. Having regard to head 4 of s. 92 and, as to the indemnity, head 1 the matter was one of the "classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces," and therefore expressly excluded from the power conferred by s. 91. [Reference was made to *Citizens' Insurance Co. v. Parsons* (2) and *Bank of Toronto v. Lambe*. (3)]

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[*Clauson K.C.* referred to *Dow v. Black*. (4)]

The Supreme Court followed its decision in *Abbott v. City of St. John* (1), but that decision conflicted with a long line of authority in Canada, and was erroneous. It was based upon the judgment of the Board in *Webb v. Outtrim* (5), which was not applicable having regard to the essential difference between the constitutions of Canada and Australia: see observation of Viscount Haldane in *Jones v. Commonwealth Court of Conciliation* (6); *Great West Saddlery Co. v. The King* (7); and 23 Law Quarterly Review, p. 373.

It is further submitted that having regard to s. 92, head 2, it is not competent to the Dominion Legislature under s. 91, head 3, to impose direct taxation in a Province.

Clauson K.C., Newcombe K.C. and T. Mathew for the respondent were not called upon.

Aug. 1. The judgment of their Lordships was delivered by

LORD PHILLIMORE. This is an appeal from a judgment of the Supreme Court of Canada affirming the judgment of Audette J. in the Exchequer Court upon an information

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(1) 40 Can. S.C.R. 597.

(2) (1881) 7 App. Cas. 96, 108.

(3) (1887) 12 App. Cas. 575,
585.

(4) (1875) L.R. 6 P.C. 272, 282.

(5) [1907] A.C. 81.

(6) [1917] A.C. 528, 531.

(7) [1921] 2 A. C. 91.

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filed by the Attorney-General of Canada on behalf of H.M. The King, whereby the appellant Caron was ordered to pay the sum of \$210 with interest and costs.

There is no dispute of fact in the case; and the sole point to be determined is whether the appellant was rightly assessed and taxed under the Dominion Income War Tax Act, 1917, and the amending Dominion statute of 1919, in respect of his salary of \$6000 a year as Minister of Agriculture in the Government of the Province of Quebec and sessional indemnity of \$1600 as a member of the Legislative Assembly of the Province, as being his income or part of his income.

It was admitted for the purposes of the action that the Minister of Finance determined pursuant to the requirements of the Acts that the amount payable for tax by the appellant was the sum of \$210, and duly notified the appellant that this amount was payable by him, and that in so determining the Minister took into account the appellant's salary as Minister of Agriculture.

It was contended on behalf of the appellant that he was notwithstanding not liable to pay this sum (1.) because it was ultra vires of the Parliament of Canada to pass the Income War Tax Acts and (2.) because in any event he was not liable to taxation in respect of his salary as Provincial Minister or his sessional indemnity.

The important provisions of the Income War Tax Act, 1917, are ss. 3 and 4: By s. 3: (1.) "For the purposes of this Act, 'income' means the annual net profit or gain or gratuity, whether ascertained and capable of computation as being wages, salary, or other fixed amount, or unascertained as being fees or emoluments, or as being profits from a trade or commercial or financial or other business or calling, directly or indirectly received by a person from any office or employment, or from any profession, or calling." Then follow certain exemptions and deductions not material. By s. 4: (1.) "There shall be assessed, levied and paid, upon the income during the preceding year of every person residing or ordinarily resident in Canada or carrying on any business in Canada, the following taxes:—" And then follow the varying rates according to the amount of the income.

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The statute of 1919 (9 & 10 Geo. 5, c. 55) amending the Income War Tax Act, 1917, provided as follows: Sect. 2: (1.)

"Sub-section one of section three of the said Act (the Income War Tax Act, 1917) is amended by inserting . . . and after the word 'contract' in the twenty-second (i.e., the last) line thereof the following: 'and including the salaries, indemnities or other remuneration of members of the Senate and House of Commons of Canada and officers thereof, members of Provincial Legislative Councils and Assemblies and Municipal Councils, Commissions or Boards of Management, any Judge of any Dominion or Provincial Court appointed after the passing of this Act, and of all persons whatsoever whether the said salaries, indemnities or other remuneration are paid out of the revenues of His Majesty in respect of His Government of Canada, or of any Province thereof, or by any person, except as provided in section five of this Act.'"

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Both the points now raised by the appellant were fully dealt with in the judgment of Audette J. When the case came before the Supreme Court of Canada the judgment was concise, the Chief Justice on behalf of the Court stating that he thought that the case was settled by the previous decision of the Court in *Abbott v. City of St. John* (1), in which case an official of the Dominion Government had been assessed on his income as such official, and it had been held that the Provinces had the right to impose income taxes upon Dominion officials resident within them in respect of their official salaries. The Court thought that the present case was the converse of *Abbott's Case* (1) and was governed by the same reasons.

The whole matter turns on the construction and application of ss. 91 and 92 of the British North America Act of 1867, and their Lordships in determining it are assisted and guided by the mass of decisions on these two sections which have been previously given by the Board.

By s. 91 of the Act it is provided that: "It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act) the

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exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated, that is to say: . . . (3.) The raising of money by any mode or system of taxation . . . And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces."

Money raised by an income tax Act is unquestionably money raised by a mode or system of taxation.

It is true that by the provisions of s. 92 the Legislature in each Province may exclusively make laws in relation to certain matters coming within the classes of subjects which are there enumerated, and that one of these classes of subjects is "direct taxation within the Province in order to the raising of a revenue for provincial purposes."

As such particular direct taxation is reserved to the Province, to that extent there is some deduction to be made from the totality of power apparently given exclusively to the Dominion Parliament to raise money for any purpose by any mode or system of taxation.

This apparent antinomy has been noticed in various decisions. It is sufficient to mention *Citizens' Insurance Co. v. Parsons* (1) and the *Bank of Toronto v. Lambe*. (2) In the latter case, their Lordships observed as follows: "It is impossible to give exclusively to the Dominion the whole subject of raising money by any mode of taxation, and at the same time to give to the provincial Legislatures, exclusively or at all, the power of direct taxation for provincial or any other purposes. This very conflict between the two sections was noticed by way of illustration in the case of *Parsons*": and after quoting from the earlier judgment, their Lordships proceeded: "Their Lordships adhere to that view, and hold that, as regards direct taxation within the Province to raise revenue for provincial purposes, that subject falls wholly within the jurisdiction of the provincial Legislatures."

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(1) 7 App. Cas. 96.

(2) 12 App. Cas. 575.

Both sections of the Act of Parliament must be construed together; and it matters not whether the principle to be applied is that the particular provision in head 2 of s. 92 effects a deduction from the general provision in head 3 of s. 91, or whether the principle be that head 3 of s. 91 is confined to Dominion taxes for Dominion purposes.

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The only occasion on which it could be necessary to consider which of these two principles was to guide, would be in the not very probable event of the Parliament of Canada desiring to raise money for provincial purposes by indirect taxation. It might then become necessary to consider whether the taxation could be supported, because the power to impose it, given by head 3 of s. 91, had not been taken out of the general power by the particular provision, or because though not given by head 3, it was given as a residual power by the other parts of s. 91. But no such question arises now.

Upon any view there is nothing in s. 92 to take away the power to impose any taxation for Dominion purposes which is *prima facie* given by head 3 of s. 91. It is not therefore *ultra vires* on the part of the Parliament of Canada to impose a Dominion income tax for Dominion purposes; and the first point must therefore be decided against the appellant.

Then as to the second point, certain incomes such as those of the Governor-General of Canada and Consuls and Consuls-General are exempted from taxation by the Acts in questions; and if there were foreign ministers resident in Canada, it would no doubt be proper that, in accordance with international law, their incomes should either be expressly exempted or impliedly held exempt from taxation. But their Lordships can see no reason in principle why any of the sources of income of a taxable citizen should be removed from the power of taxation given to the Parliament of Canada.

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It may be doubted whether it was necessary to amend the original Act in order to bring the various officers mentioned in s. 2 of the Act of 1919 within the scope of the Act of 1917. But assuming that this amending legislation was necessary, it is not to be regarded as in the nature of specific legislation directed against certain public officers, but merely as declaratory that certain classes of income are, as they cer-

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tainly would be in this country, liable to taxation and not exempt.

Various extreme cases were suggested by counsel in argument.

Objections of this class, however, were well met by Davies J. when giving the leading judgment in the case of *Abbott v. City of St. John*. (1) He was dealing with the imposition of tax by the Province upon a Dominion official, which imposition, it was contended, contravened the provisions of head 8 of s. 91, a provision which gives to the Dominion "the fixing of and providing for the salaries and allowances of civil and other officers of the Government of Canada." He said: "The Province does not attempt to interfere directly with the exercise of the Dominion power, but merely says that, when exercised, the recipients of the salaries shall be amenable to provincial legislation in like manner as all other residents. . . . It is said," he continued, "the Legislature might authorize an income tax denuding a Dominion official of a tenth or even a fifth of his official income, and, in this way, paralyse the Dominion service and impair the efficiency of the service. But it must be borne in mind that the law does not provide for a special tax on Dominion officials but for a general indiscriminatory tax upon the incomes of residents and that Dominion officials could only be taxed upon their incomes in the same ratio and proportion as other residents. At any rate, if, under the guise of exercising power of taxation, confiscation of a substantial part of official and other salaries were attempted, it would be then time enough to consider the question and not to assume beforehand such a suggested misuse of the power."

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p. 1006.

In *Great West Saddlery Co. v. The King* (2) provincial legislation, which had the effect of precluding Dominion trading companies from carrying on their business in the Province unless they complied with certain special terms, was held ultra vires, as calculated to abrogate the capacity or derogate from the status which it was in the power of the Parliament of Canada to bestow; and a general principle was laid down that no provincial Legislature could use its special powers as an indirect means of destroying powers given by the Parliament of Canada.

(1) 40 Can. S.C.R. 597, 606, 607.

(2) [1921] 2 A.C. 91.

By parity of reason the Parliament of Canada could not exercise its power of taxation so as to destroy the capacity of officials lawfully appointed by the Province.

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But the Income Tax Acts, notwithstanding the special language of the second Act, are not discriminating statutes. They are statutes for imposing on all citizens contributions according to their annual means, regardless of, or it may be said not having regard to, the source from which their annual means are derived.

For these reasons and for those given by the learned judges of the majority in *Abbott v. City of St. John* (1), to which their Lordships desire to express their assent, their Lordships will humbly recommend His Majesty that this appeal should be dismissed with costs.

Solicitors for appellant: *Blake & Redden*.

Solicitors for respondent: *Charles Russell & Co.*

(1) 40 Can. S.C.R. 597, 606, 607.

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Oct. 18.
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APPELLANT;

AND

ATTORNEY-GENERAL OF
CANADA..... }

RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Legislative Power of Province—Employment of Japanese—Conflict with Dominion Statute—Japanese Treaty Act, 1913 (3 & 4 Geo. 5, c. 27, Dom.)—11 Geo. 5, c. 49, B.C.—British North America Act, 1867 (30 & 31 Vict. c. 3), s. 132.

The statutes of British Columbia for 1921 (11 Geo. 5) by c. 49 purported to validate certain Orders in Council of the Province which provided that in all contracts, leases and concessions made by the Government provision should be made that no Chinese or Japanese should be employed in connection therewith. A treaty made between Great Britain and Japan in 1911 provided that the subjects of each should have full liberty to reside in the territories of the other, and in relation to their industries should be on the same footing as the subjects or citizens of the most favoured nation. By the Japanese Treaty Act, 1913, the Dominion Legislature had declared the treaty to have the force of law in Canada:—

Held, that the statute of British Columbia was invalid, as it violated the principle laid down in the Japanese Treaty Act, 1913, the enactment of which by the Parliament of Canada was authorized by s. 132 of the British North America Act, 1867.

Judgment of the Supreme Court affirmed.

APPEAL (No. 41 of 1922) from a judgment (February 7, 1922) of the Supreme Court of Canada. (1)

The judgment appealed from was upon the two following questions submitted to the Supreme Court on November 12, 1921, by the Governor-General in Council: (1.) Had the Legislature of British Columbia authority to enact ch. 49 of the Statutes of 1921, entitled “An Act to validate and confirm certain Orders in Council and provisions relating to the employment of persons on Crown Property”? (2.) If the said Act be in the opinion of the Court *ultra vires* in part only, then in what particulars is it *ultra vires*?

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The Supreme Court (Davies C.J., Duff, Anglin and Mignault JJ.; Idington J. dissenting, and Brodeur J.

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dissenting in part) answered the questions as follows: "The answer of the Court to the first question submitted by His Excellency the Governor-General is in the negative. It is therefore unnecessary to answer the second question. Idington J. dissenting; Brodeur J. dissenting in part."

The circumstances in which the questions were submitted, and the effect of the opinions expressed by the learned judges, appear from the judgment of the Judicial Committee. The reference to the Supreme Court is reported at 63 Can. S.C.R. 293.

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1923. July 12, 13. *Sir John Simon K.C., Farris* (Attorney-General of British Columbia) and *Hon. Geoffrey Lawrence* for the appellant. In *Brooks-Bidlake and Whittall v. Attorney-General for British Columbia* (1) the Board held that the stipulation confirmed by the Provincial Orders in Council, and consequently the Provincial Act, was not ultra vires of the Province under ss. 91 and 92 of the British North America Act, 1867, since the decision of the Board in *Cunningham v. Tomey Homma* (2) and not that in *Union Colliery Co. v. Bryden* (3) was applicable. Nor did the Act conflict with the Japanese Treaty Act. It enacted disabilities upon persons of certain racial origin, not upon any persons as having certain nationality or allegiance. The Act treated equally a Japanese who was a citizen of the United States and a Japanese who was a Japanese subject. The Chinese whose exclusion from employment was held to be legitimate in the *Brooks-Bidlake Case* (1) might have been Japanese subjects. The distinction between an Act dealing with persons of a certain racial origin, and one dealing with persons of a certain nationality, was pointed out by Duff J. in *Quong Wing v. The King*. (4) It is within the executive and legislative power of a Province to prescribe by what persons its timber shall be felled.

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Newcombe K.C. and *T. Mathew* for the respondent, were not called upon.

Oct. 18. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. This is an appeal from a judgment of the Supreme Court of Canada, expressing the answers

(1) [1923] A.C. 450.

(2) [1903] A.C. 151.

(3) [1899] A.C. 580.

(4) (1914) 49 Can. S. C. R. 440,
463.

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to two questions submitted to that Court by the Governor-General of Canada in Council, under the Canadian Supreme Court Act. The first of the questions was whether the Legislature of British Columbia had power to enact ch. 49 of its Statutes for 1921, being an Act to validate and confirm certain Orders in Council and provisions relating to the employment of persons on Crown property. The second question was, if the Court thought the Act *ultra vires* in part only, in what particulars was it *ultra vires*.

The majority of the learned judges in the Supreme Court replied that the Legislature of the Province had no power to enact the statute in question, and that the second question consequently did not arise.

The relevant facts are briefly these: In 1902 two minutes were passed in the Executive Council of the Province and approved by the Lieutenant-Governor. The Executive Council set out in these minutes resolutions passed by the Legislative Assembly, and recommended, in accordance with these resolutions, that all tunnel and drain licences issued under s. 58 of the Mineral Act and s. 48 of the Placer Mining Act, and all leases granted under Part VII. of the latter Act, should contain provisos that they were granted on the express condition that no Chinese or Japanese should be employed in or about the tunnels, drains or premises to which the licences or leases related, and that a similar provision should also be inserted in all instruments relating to a number of enumerated leases and licences which should be issued by the officers of the Provincial Government.

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p. 206. In 1913 a treaty was made between His Majesty the King and the Emperor of Japan by which it was, among other things, agreed that the subjects of each of the High Contracting Parties should have full liberty to enter, travel and reside in the territories of the other, and in all that relates to the pursuit of their industries, callings, professions and educational studies, should be placed in all respects on the same footing as the subjects or citizens of the most favoured nation.

Sect. 132 of the British North America Act provides that the Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada or any Province thereof, as part of the British Empire, towards foreign countries, arising under treaties

between the Empire and such foreign countries. On April 10, 1913, the Parliament of the Dominion passed the Japanese Treaty Act of that year. The Act provided that the Treaty just referred to should be thereby sanctioned and declared to have the force of law in Canada.

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On April 2, 1921, the Legislature of British Columbia proceeded to pass the Oriental Orders in Council Validation Act. This statute purported to validate and confirm the two Orders in Council of the Province already referred to, and passed in the form of recommendations of the Provincial Executive Council approved by the Lieutenant-Governor in May, 1902. The statute further provided that the Orders should be deemed to have been valid and effectual according to their tenor as from the dates of the approval, and that where in any instrument referred to in the said Orders in Council, or in any instrument of a similar nature to any of those so referred to, issued by any minister or officer of any department of the Government of the Province, any provision had heretofore been inserted or was thereafter inserted relating to or restricting the employment of Chinese or Japanese, that provision should be deemed to have been and to be valid, and always to have had the force of law according to its tenor. It was further enacted that every violation of or failure to observe any such provision on the part of any licensee, or other person in whose favour the instrument operated, should be sufficient ground for the cancellation of the instrument by the Lieutenant-Governor.

This is the statute the validity of which has been the subject of decision by the Supreme Court of Canada. Before, however, proceeding to the questions there discussed reference must be made to certain recent proceedings which resulted in an appeal to the Sovereign in Council and a decision which restricts the questions that are still open.

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In 1912 licences had been granted by the Minister of Lands of British Columbia to certain persons, enabling them to cut and carry away timber on lands belonging to the Province. Each of these licences was granted for a year only, but under a provision in the Crown Lands Act the licences were renewable from year to year if these terms and conditions had been complied with. Among these was the stipulation, inserted in accordance with the Orders in Council of 1902, that no Chinese or Japanese

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were to be employed in connection with the licence. The stipulation had been violated by the grantees, but notwithstanding this the licences had been renewed down to 1920.

In that year the Lieutenant-Governor of the Province referred to the Court of Appeal for British Columbia the question whether the stipulation was valid, having regard to head 25 of s. 91 of the British North America Act, which reserves for the Dominion Parliament the exclusive power to legislate with reference to "naturalization and aliens," and also to possible repugnancy to the Dominion Japanese Treaty Act of 1913. The Court of Appeal of British Columbia held the stipulation to be invalid on both grounds. However, the licences were in fact renewed for another year, and meantime the Oriental Orders in Council Validation Act was passed in April, 1921. Apparently relying on the new statute the Minister of Lands called the attention of the grantees to their breach of the stipulation, and threatened to cancel the licences.

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The grantees or the persons who had succeeded them in title then commenced an action in the Supreme Court of British Columbia claiming a declaration that, notwithstanding the stipulation, they were entitled to employ Chinese and Japanese on the timber lands, and an injunction against interference with their enjoyment under the licences. On an interlocutory motion, the judge of first instance, holding himself bound by the opinion previously given by the Court of Appeal, granted an injunction. The Provincial Government, by arrangement, appealed directly to the Supreme Court of Canada. While this appeal was pending the Governor-General referred to the Supreme Court the questions in the appeal now before their Lordships, as to the validity of the Provincial statute. The Supreme Court heard the two matters before it together, and gave successive judgments in them. As already stated, the majority held the Provincial statute to be invalid. But on the appeal in the action (1) they allowed the appeal and dismissed the action itself, mainly on the ground that, even though the stipulation as to not employing Oriental labour were void, it not the less formed one of the conditions of the licences, and could not be treated as struck out of

them, with the result that the only right to renewal was one which, being founded on a condition which was its foundation notwithstanding any illegality, must fail.

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This last question was brought on appeal to the Privy Council. Their Lordships considered both of the points made. They held, first, that the stipulation was not void as violating s. 91 of the British North America Act. For it related only to the way in which the Province claimed to be free to manage its own property as distinguished from a claim to regulate the general status of aliens. Whatever might be said about the stipulation as affecting this in the case of Japanese labour, there was nothing in the Treaty Act which affected the status of Chinese labour, and it was therefore only under s. 91 that the stipulation as to Chinese labour, which was severable, could be struck at. As their Lordships were of opinion that this particular stipulation was not inconsistent with s. 91, the appellants had no right to renewal. The point as to the Treaty Act thus became immaterial, and their Lordships did not deal with it, but dismissed the appeal on the ground just stated.

That decision (*Brooks-Bidlake and Whittall v. Attorney-General for British Columbia* (1)) thus leaves the question now before their Lordships for decision untouched. The views taken of it by the learned judges in the Supreme Court of Canada were divergent. Davies C.J. thought that the Provincial Act of 1921 was ultra vires (1.) as infringing the provisions of s. 91 of the British North America Act, and (2.) as conflicting with the provisions of the Treaty Act, 1913, by prohibiting the employment of Japanese subjects. Idington J. (who dissented from the conclusion of the majority) was of opinion that the powers of the Provincial Government over the lands of the Province were as extensive as those of private owners, and that a private owner could have determined not to have Japanese subjects on his property, and could have stipulated to that effect. He thought that, this being so, the terms of the Treaty must be construed as leaving intact the right of the Province to exercise that liberty of a private owner, which he held the Treaty not to touch. Duff J. devoted the first part of an exhaustive judgment to the question whether the Provincial statute of 1921 was ultra vires as being an

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(1) [1923] A.C. 450.

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attempt at legislation in regard to aliens, the capacity for which was conferred exclusively on the Dominion Parliament by s. 91. He came to the conclusion that the statute was not such an attempt, but was so far a legally valid exercise by the Provincial Legislature of a power confided to it of making provision for settlement on Provincial property of a suitable population. He pointed out that the two Orders in Council and the condition which they imposed related only to specific and limited kinds of such property. What was excluded was not the employment of subjects of foreign Powers, in particular, but that of Chinese and Japanese, whether aliens, naturalized subjects or native-born subjects, under particular circumstances. But when the learned judge passed to s. 132 he came to the conclusion that the Treaty Act was the exercise of an authority to the Dominion to deal with subjects of imperial and national concern as distinguished from matters of strictly Dominion concern only. He thought the scope of the section broad enough to support the Treaty Act, and to put Japanese subjects in the same position before the law as the subjects of the most favoured nation. The statute of 1921 he held to contravene the right so given to Japanese subjects, by excluding them from employment in certain definite cases. And this was not the less so in that the Province in so doing was administering its own corporate and economic affairs. The new Provincial law was repugnant to the Treaty and could not stand. Since the statute of 1921 treats Chinese and Japanese as constituting a single group, the learned judge thought that it was inoperative, not merely as regards Japanese subjects, but in toto. Anglin J. based his opinion entirely on s. 91, which he held the statute of 1921 to contravene. It was in substance a statute passed to deprive Chinese and Japanese of general capacity. He expressed no opinion about the effect of the Treaty Act. Mignault J. delivered judgment to the same effect as Anglin J. Brodeur J. thought the Provincial statute intra vires so far as s. 91 was concerned, and authorized by s. 92, head 5, which confers on the Province authority to manage the public lands belonging to it. But he considered the statute to be ultra vires in so far as Japanese subjects were concerned, as conflicting with the provisions of the Treaty Act. He considered it, however, to be intra vires as regards the Chinese.

As the result of the opinion delivered in the Supreme Court of Canada, the Governor-General in Council on March 31, 1922, being within the year from the passing of the statute of 1921, during which his power of disallowance remained operative, disallowed it.

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Leave to appeal to the Sovereign in Council against the judgment of the Supreme Court was subsequently given. On the decision in the present appeal depends, therefore, the ascertainment of the limits within which the Legislature of the Province can attempt further legislation on the subject. What their Lordships have to consider is whether the statute of 1921 is invalid on any of the grounds alleged. The main reasons submitted in favour of its invalidity are, first that s. 91, head 25, of the British North America Act has debarred the Provincial Legislature from enacting what was really in its pith and substance legislation dealing with the rights of aliens. It is said that although the statute contains provisions regulating the mode of dealing with its own property by the Province, it not the less is a statute which affects radically the status of classes of aliens. Whether it relates to Chinese or Japanese it thus equally trenches to an extent which cannot be exhaustively defined on the subject matter assigned to the Dominion by s. 91, head 25. The principle which applies is alleged to be that laid down in *Union Colliery Co. v. Bryden* (1), and not that applied in *Cunningham v. Tomey Homma* (2).

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In the appeal in the *Brooks-Bidlake Case* (3) what their Lordships decided was that the stipulation in the licences against the employment of Chinese was a severable stipulation which had been broken, with the result that the licensees could not claim a renewal. Such a stipulation was held to be in itself consistent with s. 91, head 25, and so far as Chinese labour was concerned no question could arise under the Japanese Treaty.

On the present occasion a wholly different question presents itself. The statute of 1921 not only confirms the stipulations provided for in the Orders in Council of 1902, but it enacts that where in any instrument of a similar nature to any of those referred to in these Orders a provision is inserted relating to or restricting the employment of

(1) [1899] A.C. 580.

(2) [1903] A.C. 151.

(3) [1923] A.C. 450.

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Chinese or Japanese, the provision is to be valid and to have the force of law, and failure to observe it is to be ground for cancellation by the Provincial Government of the licence or other instrument. Their Lordships observe that this provision may not altogether unreasonably be looked on as containing an approach to the laying down of something more than a mere condition for the renewal of the right to use Provincial property. Still, the question is far from free from difficulty, for the reasons assigned by Duff J. in his judgment in the Supreme Court.

In the view, however, which their Lordships take of the bearing of the Treaty Act on the statute it becomes unnecessary for them to express any opinion about it, and they refrain from doing so in accordance with the practice which they have repeatedly laid down for their own guidance of deciding no more than is necessary in appeals relative to the interpretation of the British North America Act.

As regards the question arising as to the application of the Treaty Act itself, they entertain no doubt that the Provincial statute violated the principle laid down in the Dominion Act of 1913. This conclusion does not in any way affect what they decided on the previous appeal as to the title to a renewal of the special licences relative to particular properties. It is concerned with the principle of the statute of 1921, and not with that of merely individual instances in which particular kinds of property are being administered.

The statute has been disallowed, and if re-enacted in any form will have, in their Lordships' opinion, to be re-enacted in terms which do not strike at the principle in the Treaty that the subjects of the Emperor of Japan are to be in all that relates to their industries and callings in all respects on the same footing as the subjects or citizens of the most favoured nation. They are unable to accept the view that as the terms of the statute stand they do not infringe this principle so far as concerns subjects of the Emperor. That others who are not such subjects happen to be included can make no difference to this conclusion.

As the result, their Lordships will humbly advise His Majesty that the first of the questions submitted to the Supreme Court of Canada should be answered in the negative, as that Court has answered it. The second question

does not arise for the reason they have indicated. The statute has been disallowed. It may not be necessary to enact it in a fresh form, but if this is to be done it may be possible so to redraft it as to exclude from the operation of its principle all subjects of the Japanese Emperor and also to avoid the risk of conflict with s. 91, sub-s. 25, of the British North America Act. The question whether there has been success in the latter respect can only be answered when the terms of any fresh statute are known. The appeal should accordingly be dismissed, and, in accordance with a practice that is usual, without costs.

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Solicitors for appellant: *Gard, Lyell, Betenson & Davidson.*

Solicitors for respondent: *Charles Russell & Co.*

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AND

SNIDER AND OTHERS..... RESPONDENTS.

ATTORNEYS-GENERAL FOR
CANADA AND ONTARIO..... } INTERVENERS.

ON APPEAL FROM THE SUPREME COURT OF ONTARIO,
APPELLATE DIVISION.

Canada—Legislative Power—Industrial Disputes—Property and Civil Rights in the Provinces—“Peace, order, and good government of Canada”—Industrial Disputes Investigation Act, 1907 (6 & 7 Edw. 7, c. 20, Dom.)—British North America Act, 1867 (30 & 31 Vict. c. 3), ss. 91, 92.

The Industrial Disputes Investigation Act, 1907, of Canada, provided that upon a dispute occurring between employers and employees in any of a large number of important industries in Canada the Minister for Labour for the Dominion might appoint a Board of Investigation and Conciliation. The Board was to make investigations, with power to summon witnesses and inspect documents and premises, and was to try to bring about a settlement; if no settlement resulted, they were to make a report with recommendations as to fair terms, but the report was not to be binding upon the parties. After a reference to a Board a lock-out or strike was to be unlawful, and subject to penalties:—

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Held, that the Act was not within the competence of the Parliament of Canada under the British North America Act, 1867. It clearly was in relation to property and civil rights in the Provinces, a subject reserved to the Provincial Legislatures by s. 92, sub-s. 13, and was not within any of the overriding powers of the Dominion Legislature specifically set out in s. 91; the Act could not be justified under the general power in s. 91 to make laws “for the peace, order, and good government of Canada,” as it was not established that there existed in the matter any emergency which put the national life of Canada in unanticipated peril.

Russell v. The Queen (1882) 7 App. Cas. 829, in the light of later decisions, can be supported only upon the assumption that the Judicial Committee considered that when the Dominion Act then in question was passed the evil of intemperance amounted in Canada to an emergency of the kind above mentioned.

In re Board of Commerce Act, 1919 [1922] 1 A.C. 191 followed; *Fort Frances Pulp and Paper Co. v. Manitoba Free Press Co.* [1923] A.C. 695 distinguished.

Judgment of the Supreme Court (55 Ont. L.R. 454) reversed.

APPEAL (No. 99 of 1924) by special leave from a judgment of the Supreme Court of Ontario, Appellate Division, dated April 22, 1924, affirming a judgment of Mowat J.

**Present*: VISCOUNT HALDANE, LORD DUNEDIN, LORD ATKINSON, LORD WRENBURY, and LORD SALVESEN.

The appellants were a Board of Commissioners appointed under an Act of Ontario to manage the municipal electric light, power, and heat works in Toronto, and had the duties and powers of commissioners under the Public Utilities Act (R.S. Ont., 1914, c. 204). The respondents constituted a Board appointed on the application of employees of the appellants by the Minister for Labour for the Dominion under the Industrial Disputes Investigation Act, 1907 (6 & 7 Edw. 7, c. 20, Dom.), an Act "to aid in the prevention and settlement of strikes and lock-outs in mines and industries connected with public utilities."

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The appellants on August 21, 1923, commenced an action in the Supreme Court of Ontario claiming a declaration that the respondents were acting without lawful authority, and for an injunction.

Orde J. granted an interlocutory judgment restraining the defendants until the trial from entering upon the plaintiffs' premises, or exercising any of the compulsory powers purporting to be given to them as a Board by ss. 30 to 38 of the Industrial Disputes Investigation Act, 1907, of Canada. The learned judge was of opinion that the Act was ultra vires the Parliament of Canada.

The action was tried by Mowat J. in November 1924, the Attorneys-General for Canada and for Ontario being heard as interveners. The learned judge was of opinion that the Act of 1907 was within the competence of the Parliament of Canada; as he differed from Orde J. he referred the action to the Appellate Division under ss. 3 and 4 of the Judicature Act (R.S. Ont., c. 56).

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The Appellate Division (Hodgins J.A. dissenting) affirmed the view of Mowat J. and dismissed the action.

The reasons of the learned judges appear from the judgment of the Judicial Committee.

The appeal to the Appellate Division is reported at 55 Ont. L. R. 454.

1924. Nov. 14, 18, 20, 21, 24. *Stuart Bevan K.C.*, *Hon. Geoffrey Lawrence* and *J. R. Robinson* for the appellants, and for the Attorney-General for Ontario. The Act of 1907 was ultra vires the Dominion Parliament under the British North America Act, 1867. It interfered seriously with civil rights in the Provinces, a subject within the

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exclusive powers of the Provincial Legislatures under s. 92, head 13: *Citizens Insurance Co. v. Parsons* (1); *In re Board of Commerce Act.* (2) Further, the appellants were a municipal institution, and subject under s. 92, head 8, to the same exclusive powers. The imposition of penalties did not bring the Act within the power of the Dominion under s. 91, head 27, as to criminal law: *Attorney-General for Ontario v. Reciprocal Insurers* (3); nor does it fall within head 2, the "regulation of trade and commerce." Even if the subject is either trade or commerce, head 2 does not entitle interference with particular trades: *Citizens Insurance Co. v. Parsons* (1); *John Deere Plow Co. v. Wharton.* (4) As there was no overlapping of the two powers, the principle applied in *Grand Trunk Ry. Co. v. Attorney-General of Canada* (5), and the two decisions there followed, does not apply. The Act being in relation to matters specified in s. 92, the general power of the Parliament of Canada to pass laws for the "peace, order, and good government of Canada" cannot be invoked: *Prohibition Case* (6); *Insurance Act Case* (7); *In re Board of Commerce Act.* (8) *Russell v. The Queen* (9) was decided upon the basis that the Act there in question was not really within any of the enumerations in ss. 91 and 92; it has been explained in *Hodge v. The Queen* (10), *Attorney-General for Canada v. Attorney-General for Alberta* (11), and *In re Board of Commerce Act.* (2) The last named decision cannot be distinguished; it shows that Dominion legislation which interferes with civil rights in the Provinces can only be justified where there are very exceptional circumstances amounting to a national peril, whereby the matter transcends the subjects enumerated in s. 92; and that Dominion wide importance is not of itself sufficient to bring the general words into operation. Here the evidence does not show that there was any emergency or peril, such as was referred to in that case, and was held to have existed in *Fort Frances Pulp and Power Co. v. Manitoba Free Press Co.* (12). The Provincial Legislatures could have provided legislation adequate to deal with the matter.

(1) (1881) 7 App. Cas. 96.

(2) [1922] 1 A.C. 191.

(3) [1924] A.C. 328.

(4) [1915] A.C. 330, 340.

(5) [1907] A.C. 65.

(6) [1896] A.C. 348, 366.

(7) [1916] 1 A.C. 588, 595.

(8) [1922] 1 A.C. 191, 197.

(9) 7 App. Cas. 829.

(10) (1883) 9 App. Cas. 117.

(11) [1916] 1 A.C. 588.

(12) [1923] A.C. 695.

Sir John Simon K.C. and *Lewis Duncan* for the respondents. The Act was not "in relation to matters coming within the classes of subjects" enumerated in s. 92. An Act may interfere with property or civil rights without being "in relation to" that subject within the meaning of s. 92; the real question is as to the "aspect" in which an Act is to be regarded. The British North America Act, 1867, s. 91, assigns the subject of the criminal law to the Dominion. No reference was made to industrial disputes, because the criminal law of England as it existed in 1792, under which strikes were unlawful, was part of the law of Canada by 40 Geo. 3, c. 1, s. 1; and by an Act of Canada of 1824 (5 Geo. 3, c. 95) the law of England as to combinations remained in force save so far as it might be modified by the Criminal Code of Canada. With regard to the law in England, see per Erle J. in *Reg. v. Rowlands* (1) and Stephen's History of the Criminal Law, vol. iii., pp. 203 et seq. The Act now under discussion in its pith and substance is one dealing with the criminal law, and not one in relation to civil rights. Every Act dealing with the criminal law necessarily touches on civil rights. The Act was competent within the principle followed in *Russell v. The Queen*. (2) It dealt with a matter which was "of Canadian interest and importance": see per Lord Watson in the *Prohibition* case. (3) Owing to the absence of any economic division between the Provinces, the matter could only be dealt with effectively by Dominion legislation. The Act was therefore competent within the general power to make laws for the peace, order, and good government of Canada. The *Board of Commerce* case (4) is distinguishable; there the direct object of the Act was to prevent people from exercising the most ordinary civil rights, here any interference with civil rights is merely incidental. [Reference was made also to Lefroy, Legislative Power in Canada, prop. 34; Kennedy, Constitution of Canada, p. 303.]

Clauson K.C. (*James Wylie* with him) for the Attorney-General for Canada supported the arguments for the respondents.

Stuart Bevan K.C. replied.

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(1) (1851) 5 Cox, C.C. 436, 461.
(2) 7 App. Cas. 829.

(3) [1896] A.C. 348, 360.
(4) [1922] 1 A.C. 191.

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1925. Jan. 20. The judgment of their Lordships was delivered by

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VISCOUNT HALDANE. It is always with reluctance that their Lordships come to a conclusion adverse to the constitutional validity of any Canadian statute that has been before the public for years as having been validly enacted, but the duty incumbent on the Judicial Committee, now as always, is simply to interpret the British North America Act and to decide whether the statute in question has been within the competence of the Dominion Parliament under the terms of s. 91 of that Act. In this case the Judicial Committee have come to the conclusion that it was not. To that conclusion they find themselves compelled, alike by the structure of s. 91 and by the interpretation of its terms that has now been established by a series of authorities. They have had the advantage not only of hearing full arguments on the question, but of having before them judgments in the Courts of Ontario, from which this appeal to the Sovereign in Council came directly. Some of these judgments are against the view which they themselves take, others are in favour of it, but all of them are of a high degree of thoroughness and ability.

The particular exercise of legislative power with which their Lordships are concerned is contained in a well-known Act, passed by the Dominion Parliament in 1907, and known as the Industrial Disputes Investigation Act. As it now stands it has been amended by subsequent Acts, but nothing turns, for the purposes of the question now raised, on any of the amendments that have been introduced.

The primary object of the Act was to enable industrial disputes between any employer in Canada and any one or more of his employees, as to "matters or things affecting or relating to work done or to be done by him or them, or as to the privileges, rights and duties of employers or employees (not involving any such violation thereof as constitutes an indictable offence)," relating to wages or remuneration, or hours of employment; sex, age or qualifications of employees, and the mode, terms and conditions of employment; the employment of children or any person, or classes of persons; claims as to whether preference of employment should be given to members of labour or other organizations; materials supplied or damage done to work;

customs or usages, either general or in particular districts; and the interpretation of agreements. Either of the parties to any such dispute was empowered by the Act to apply to the Minister of Labour for the Dominion for the appointment of a Board of Conciliation and Investigation, to which Board the dispute might be referred. The Act enabled the Governor in Council to appoint a Registrar of such Boards, with the duty of dealing with all applications for reference, bringing them to the notice of the Minister, and conducting the correspondence necessary for the constitution of the Boards. The Minister was empowered to establish a Board when he thought fit, and no question was to be raised in any Court interfering with his decision. Each Board was to consist of three members, to be appointed by the Minister, one on the recommendation of the employer, one on that of the employees, and the third, who was to be chairman, on the recommendation of the members so chosen. If any of them failed in this duty the Minister was to make the appointment. The department of the Minister of Labour was to provide the staffs required. The application for a Board was to be accompanied by a statutory declaration showing that, failing adjustment, a lock-out or strike would probably occur.

The Board so constituted was to make inquiry and to endeavour to effect a settlement. If the parties came to a settlement the Board was to embody it in a memorandum of recommendation which, if the parties had agreed to it in writing, was to have the effect of an award on a reference to arbitration or one made under the order of a Court of record. In such a case the recommendation could be constituted a rule of Court and enforced accordingly. If no such settlement was arrived at, then the Board was to make a full report and a recommendation for settlement to the Minister, who was to make it public.

The Boards set up were given powers to summon and to enforce the attendance of witnesses, to administer oaths and to call for business books and other documents, and also to order into custody or subject to fine, in case of disobedience or contempt. The Board was also empowered to enter any premises where anything was taking place which was the subject of the reference and to inspect. This power was also enforceable by penalty. The parties were

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to be represented before the Board, but no counsel or solicitors were to appear excepting by consent and subject to the sanction of the Board itself. The proceedings were normally to take place in public.

By s. 56 of the Act, in the event of a reference to a Board, it was made unlawful for the employer to lock-out or for the employees to strike on account of any dispute prior to or pending the reference, and any breach of this provision was made punishable by fine. By s. 57, employers and employed were both bound to give at least thirty days' notice of an intended change affecting conditions of employment with respect to wages or hours. In the event of a dispute arising over the intended change, until the dispute had been finally dealt with by a Board and a report had been made, neither employers nor employed were to alter the conditions, or lock-out or strike, or suspend employment or work, and the relationship of employer and employee was to continue uninterrupted. If, in the opinion of the Board, either party were to use this or any other provision of the Act for the purpose of unjustly maintaining a given condition of affairs through delay, and the Board were so to report to the Minister, such party was to be guilty of an offence and liable to penalties.

By s. 63 (*a*), where a strike or lock-out had occurred or was threatened, the Minister was empowered, although neither of the parties to the dispute had applied for one, to set up a Board. He might also, under the next section, without any application, institute an inquiry.

Whatever else may be the effect of this enactment, it is clear that it is one which could have been passed, so far as any Province was concerned, by the Provincial Legislature under the powers conferred by s. 92 of the British North America Act. For its provisions were concerned directly with the civil rights of both employers and employed in the Province. It set up a Board of Inquiry which could summon them before it, administer to them oaths, call for their papers and enter their premises. It did no more than what a Provincial Legislature could have done under head 15 of s. 92, when it imposed punishment by way of penalty in order to enforce the new restrictions on civil rights. It interfered further with civil rights when, by s. 56, it suspended liberty to lock-out or strike during a reference

to a Board. It does not appear that there is anything in the Dominion Act which could not have been enacted by the Legislature of Ontario, excepting one provision. The field for the operation of the Act was made the whole of Canada.

In 1914 the Legislature of the Province of Ontario passed a Trade Disputes Act which substantially covered the whole of these matters, so far as Ontario was concerned, excepting in certain minor particulars. One of these was the interference in the Dominion Act with the right to lock-out or strike during an inquiry. This was not reproduced in the Ontario Act. Another difference was the necessary one that the operation of the Ontario Act was confined to that Province, instead of extending to other parts of Canada. It was, of course, open to the Legislatures of the other Provinces to enact similar provisions, and some of them appear to have done so.

Subject to variations such as these there is, in the Ontario Act, little alteration in substance of the provisions of the Dominion statute. The Lieutenant-Governor of the Province, instead of the Minister of Labour, appoints the Registrar. There are to be set up two different kinds of statutory Council, one of Conciliation, the four members of which are to be nominated by the parties, the other a Council of Arbitration, consisting of three members, two of whom are to be appointed by the Lieutenant-Governor of the Province on the recommendation of the parties, and the third, the chairman, to be nominated by the Lieutenant-Governor on failure of the parties to agree and name. The mayor of any city or town in the Province, on being notified that a strike or lock-out is impending, may inform the Registrar of the fact, and a Council of Arbitration may then be empowered to inquire and to mediate. Unless there is an agreement by one or both of the parties, in which case the award of the Council may be enforced as on an arbitration, there is no power given to suspend the right to strike or lock-out.

It is clear that this enactment was one which was competent to the Legislature of a Province under s. 92. In the present case the substance of it was possibly competent, not merely under the head of property and civil rights in the Province, but also under that of municipal institutions in the Province. For the appellants are incorporated, by the Province, a Public Utility Commission, within the

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definition in ch. 204 of the Revised Statutes of Ontario, 1914, relating to the constitution and operation of works for supplying public utilities by municipal corporations and companies, and are employers within the meaning of the Ontario Trade Disputes Act already referred to. Their function is to manage the municipal electric light, heat, and power works of the City of Toronto.

The primary respondents in this appeal are the members of a Board of Conciliation appointed by the Dominion Minister of Labour under the Act first referred to. There was a dispute in 1923 between the appellants and a number of the men whom they employed, which dispute was referred to the first respondents, who proceeded to exercise the powers given by the Dominion Act. The appellants then commenced an action in the Supreme Court of Ontario for an injunction to restrain these proceedings, on the allegation that the Dominion Act was *ultra vires*. The Attorneys-General of Canada and of Ontario were notified and made parties as intervenants.

There was a motion for an interim injunction, which was heard by Orde J., who, after argument, granted an injunction till the trial. The action was tried by Mowat J., who intimated his dissent from the view of the British North America Act taken by Orde J., who was co-ordinate in authority with him, according to which view the Dominion Act was *ultra vires*. He, therefore, as he had power by the Provincial Judicature Act to do, directed the action to be heard by a Divisional Court, and it was ultimately heard by the Appellate Division of the Supreme Court of Ontario (Mulock C.J., Magee, Hodgins, Ferguson and Smith J.J.A.). The result was that by the majority (Hodgins J.A. dissenting) the action of the appellants was dismissed.

The broad grounds of the judgment of the majority, which will be referred to later on, was that the Dominion Act was not a law relating to matters as to which s. 92 conferred exclusive jurisdiction, but was a law within the competence of the Dominion Parliament, inasmuch as it was directed to the regulation of trade and commerce throughout Canada, and to the protection of the national peace, order and good government, by reason of (a) confining, within limits, a dispute which might spread over all the Provinces; (b) informing the general public in Canada of the nature of the dispute; and (c) bringing public opinion to bear on it.

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The power of the Dominion Parliament to legislate in relation to criminal law, under head 27 of s. 91, was also considered to apply.

Before referring to these grounds of judgment their Lordships, without repeating at length what has been laid down by them in earlier cases, desire to refer briefly to the construction which, in their opinion, has been authoritatively put on ss. 91 and 92 by the more recent decisions of the Judicial Committee. The Dominion Parliament has, under the initial words of s. 91, a general power to make laws for Canada. But these laws are not to relate to the classes of subjects assigned to the Provinces by s. 92, unless their enactment falls under heads specifically assigned to the Dominion Parliament by the enumeration in s. 91. When there is a question as to which legislative authority has the power to pass an Act, the first question must therefore be whether the subject falls within s. 92. Even if it does, the further question must be answered, whether it falls also under an enumerated head in s. 91. If so, the Dominion has the paramount power of legislating in relation to it. If the subject falls within neither of the sets of enumerated heads, then the Dominion may have power to legislate under the general words at the beginning of s. 91.

Applying this principle, does the subject of the legislation in controversy fall fully within s. 92? For the reasons already given their Lordships think that it clearly does. If so, is the exclusive power *prima facie* conferred on the Province trenched on by any of the over-riding powers set out specifically in s. 91? It was, among other things, contended in the argument that the Dominion Act now challenged was authorized under head 27, "the Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters." It was further suggested in the argument that the power so conferred is aided by the power conferred on the Parliament of Canada to establish additional Courts for the better administration of the laws of Canada.

But their Lordships are unable to accede to these contentions. They think that they cannot now be maintained successfully, in view of a series of decisions in which this Board has laid down the interpretation of s. 91, head 27, in the British North America Act on the point. In the

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most recent of these cases, *Attorney-General for Ontario v. Reciprocal Insurers* (1), Duff J. stated definitely the true interpretation, in delivering the judgment of the Judicial Committee. Summing up the effect of the series of previous decisions relating to the point, he said: "In accordance with the principle inherent in these decisions their Lordships think it is no longer open to dispute that the Parliament of Canada cannot, by purporting to create penal sanctions under s. 91, head 27, appropriate to itself exclusively a field of jurisdiction in which, apart from such a procedure, it could exert no legal authority, and that if, when examined as a whole, legislation in form criminal is found, in aspects and for purposes exclusively within the Provincial sphere, to deal with matters committed to the Provinces, it cannot be upheld as valid."

In the earlier *Board of Commerce* case (2) the principle to be applied was laid down in the same way. It was pointed out that the Dominion had exclusive legislative power to create new crimes "where the subject matter is one which, by its very nature, belongs to the domain of criminal jurisprudence." But "it is quite another thing, first to attempt to interfere with a class of subject committed exclusively to the Provincial Legislature, and then to justify this by enacting ancillary provisions, designated as new phases of Dominion criminal law, which require a title to so interfere as the basis of their application."

Their Lordships are of opinion that, on authority as well as on principle, they are to-day precluded from accepting the arguments that the Dominion Act in controversy can be justified as being an exercise of the Dominion power under s. 91 in relation to criminal law. What the Industrial Disputes Investigation Act, which the Dominion Parliament passed in 1907, aimed at accomplishing was to enable the Dominion Government to appoint anywhere in Canada a Board of Conciliation and Investigation to which the dispute between an employer and his employees might be referred. The Board was to have power to enforce the attendance of witnesses and to compel the production of documents. It could under the Act enter premises, interrogate the persons there, and inspect the work. It rendered it unlawful for an employer to lock-out or for a workman to strike, on

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(1) [1924] A.C. 328, 342.

(2) 1922 1 A.C. 191.

account of the dispute, prior to or during the reference, and imposed an obligation on employees and employers to give thirty days' notice of any intended change affecting wages or hours. Until the reference was concluded neither were to alter the conditions with respect to these. It is obvious that these provisions dealt with civil rights, and it was not within the power of the Dominion Parliament to make this otherwise by imposing merely ancillary penalties. The penalties for breach of the restrictions did not render the statute the less an interference with civil rights in its pith and substance. The Act is not one which aims at making striking generally a new crime. Moreover, the employer retains under the general common law a right to lock-out, only slightly interfered with by the penalty. In this connection their Lordships are therefore of opinion that the validity of the Act cannot be sustained.

The point was also put in a somewhat different form. It was said that the criminal law of Canada was in its foundation the criminal law of England as at September 17, 1792; that, according to the criminal law of England as at that date, a strike was indictable as a conspiracy; that, consequently, strikes were within the ambit of the criminal law; and that, as a law either declaring strikes illegal as at common law, or making them illegal would be a proper enactment of the criminal law, so, though this is a rather a non sequitur, it was only a branch of that law to enact provisions which should have the effect of preventing strikes coming into existence.

It is not necessary to investigate or determine whether a strike is per se a crime according to the law of England in 1792. A great deal has been said on the subject and contrary opinions expressed. Let it be assumed that it was. It certainly was so only on the ground of conspiracy. But there is no conspiracy involved in a lock-out; and the statute under discussion deals with lock-outs *pari ratione* as with strikes. It would be impossible, even if it were desirable, to separate the provisions as to strikes from those as to lock-outs, so as to make the one fall under the criminal law while the other remained outside it; and, therefore, in their Lordships' opinion this argument also fails.

Nor does the invocation of the specific power in s. 91 to regulate trade and commerce assist the Dominion contention.

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In *Citizens Insurance Co. v. Parsons* (1) it was laid down that the collocation of this head (No. 2 of s. 91), with classes of subjects enumerated of national and general concern, indicates that what was in the mind of the Imperial Legislature when this power was conferred in 1867 was regulation relating to general trade and commerce. Any other construction would, it was pointed out, have rendered unnecessary the specific mention of certain other heads dealing with banking, bills of exchange and promissory notes, as to which it had been significantly deemed necessary to insert a specific mention. The contracts of a particular trade or business could not, therefore, be dealt with by Dominion legislation so as to conflict with the powers assigned to the Provinces over property and civil rights relating to the regulation of trade and commerce. The Dominion power has a really definite effect when applied in aid of what the Dominion Government are specifically enabled to do independently of the general regulation of trade and commerce, for instance, in the creation of Dominion companies with power to trade throughout the whole of Canada. This was shown in the decision in *John Deere Plow Co. v. Wharton*. (2) The same thing is true of the exercise of an emergency power required, as on the occasion of war, in the interest of Canada as a whole, a power which may operate outside the specific enumerations in both ss. 91 and 92. And it was observed in *Attorney-General for Canada v. Attorney-General for Alberta* (3), in reference to attempted dominion legislation about insurance, that it must now be taken that the authority to legislate for the regulation of trade and commerce does not extend to the regulation, for instance, by a licensing system, of a particular trade in which Canadians would otherwise be free to engage in the Provinces. (2) It is, in their Lordships' opinion, now clear that, excepting so far as the power can be invoked in aid of capacity conferred independently under other words in s. 91, the power to regulate trade and commerce cannot be relied on as enabling the Dominion Parliament to regulate civil rights in the Provinces.

A more difficult question arises with reference to the initial words of s. 91, which enable the Parliament of Canada

(1) 7 App. Cas. 96, 112.

(2) [1915] A.C. 330, 340.

(3) [1916] 1 A.C. 588, 596.

to make laws for the peace, order and good government of Canada in matters falling outside the Provincial powers specifically conferred by s. 92. For *Russell v. The Queen* (1) was a decision in which the Judicial Committee said that it was within the competency of the Dominion Parliament to establish a uniform system for prohibiting the liquor traffic throughout Canada excepting under restrictive conditions. It has been observed subsequently by this Committee that it is now clear that it was on the ground that the subject matter lay outside Provincial powers, and not on the ground that it was authorized as legislation for the regulation of trade and commerce, that the Canada Temperance Act was sustained: see *Attorney-General for Canada v. Attorney-General for Alberta* (2). But even on this footing it is not easy to reconcile the decision in *Russell v. The Queen* (1) with the subsequent decision in *Hodge v. The Queen* (3) that the Ontario Liquor Licence Act, with the powers of regulation which it entrusted to local authorities in the Province, was intra vires of the Ontario Legislature. Still more difficult is it to reconcile *Russell v. The Queen* (1) with the decision given later by the Judicial Committee that the Dominion licensing statute, known as the McCarthy Act, which sought to establish a local licensing system for the liquor traffic throughout the Dominion, was ultra vires of the Dominion Parliament. As to this last decision it is not without significance that the strong Board which delivered it abstained from giving any reasons for their conclusion. They did not in terms dissent from the reasons given in *Russell v. The Queen*. (1) They may have thought that the case was binding on them as deciding that the particular Canada Temperance Act of 1886 had been conclusively held valid, on the ground of fact that at the period of the passing of the Act the circumstances of the time required it in an emergency affecting Canada as a whole. The McCarthy Act, already referred to, which was decided to have been ultra vires of the Dominion Parliament, was dealt with in the end of 1885. Ten years subsequently another powerful Board decided *Attorney-General for Ontario v. Attorney-General for the Dominion*, known as the *Distillers' and Brewers' case*. (4) Lord

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(1) 7 App. Cas. 829.
(2) [1916] 1 A.C. 588, 595.

(3) 9 App. Cas. 117.
(4) [1896] A.C. 348, 362.

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Herschell and Lord Davey, who had been the leading counsel in the *McCarthy* case, sat on that Board, along with Lord Halsbury, who had presided at it. In delivering the judgment, Lord Watson used in the latter case significant language (1): "The judgment of this Board in *Russell v. The Queen* (2), has relieved their Lordships from the difficult duty of considering whether the Canada Temperance Act of 1886 relates to the peace, order, and good government of Canada, in such sense as to bring its provisions within the competency of the Canadian Parliament." That decision, he said, must be accepted as an authority to the extent to which it goes—namely, that "the restrictive provisions of the Act of 1886, when they have been duly brought into operation in any Provincial area within the Dominion must receive effect as valid enactments relating to the peace, order and good government of Canada."

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The Board held that, on that occasion, they could, not inconsistently with *Russell v. The Queen* (2), declare a statute of the Ontario Legislature establishing Provincial liquor prohibitions, to be within the competence of a Provincial Legislature, provided that the locality had not already adopted the provisions of the Dominion Act of 1886.

It appears to their Lordships that it is not now open to them to treat *Russell v. The Queen* (2) as having established the general principle that the mere fact that Dominion legislation is for the general advantage of Canada, or is such that it will meet a mere want which is felt throughout the Dominion, renders it competent if it cannot be brought within the heads enumerated specifically in s. 91. Unless this is so, if the subject matter falls within any of the enumerated heads in s. 92, such legislation belongs exclusively to Provincial competency. No doubt there may be cases arising out of some extraordinary peril to the national life of Canada, as a whole, such as the cases arising out of a war, where legislation is required of an order that passes beyond the heads of exclusive Provincial competency. Such cases may be dealt with under the words at the commencement of s. 91, conferring general powers in relation to peace, order and good government, simply because such cases are not otherwise provided for. But instances of this, as was pointed out in the judgment in *Fort Frances Pulp and*

(1) Ibid. 362. (A.C.)

(2) 7 App. Cas. 829.

Power Co. v. Manitoba Free Press (1) are highly exceptional. Their Lordships think that the decision in *Russell v. The Queen* (2) can only be supported to-day, not on the footing of having laid down an interpretation, such as has sometimes been invoked of the general words at the beginning of s. 91, but on the assumption of the Board, apparently made at the time of deciding the case of *Russell v. The Queen* (2), that the evil of intemperance at that time amounted in Canada to one so great and so general that at least for the period it was a menace to the national life of Canada so serious and pressing that the National Parliament was called on to intervene to protect the nation from disaster. An epidemic of pestilence might conceivably have been regarded as analogous. It is plain from the decision in the *Board of Commerce* case (3) that the evil of profiteering could not have been so invoked, for Provincial powers, if exercised, were adequate to it. Their Lordships find it difficult to explain the decision in *Russell v. The Queen* (2) as more than a decision of this order upon facts, considered to have been established at its date rather than upon general law.

The judgments in the Courts below express differing views. Orde J. granted an interim injunction, restraining the first respondents from interfering with the business of the appellants and from entering on their premises, or examining their works or employees, and from exercising their compulsory powers as a Board of Conciliation and Investigation under the Dominion Act, and from interfering with the property and civil or municipal rights of the appellants. He held that the Dominion legislation interfered with Provincial rights under s. 92 in a fashion which could not be supported under any of the enumerated heads in s. 91, and therefore could not be sustained by invoking the general words with which that section commences. The decision in the *Fort Frances Pulp* case (1) afforded no analogy on which such a contention as this last could be based.

Mowat J., dissenting from this reasoning, referred the trial of the action to a Divisional Court. He thought that the legislation in question was a matter of national importance, dealing with a subject which affected the body politic of the Dominion, as in *Russell v. The Queen*. (2)

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(1) [1923] A.C. 695.

(2) 7 App. Cas. 829.

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In the Appellate Division, Mulock C. J., Smith J.A., and Magee J.A. concurred in the judgment delivered by Ferguson J.A. That learned judge held that the Act in question was not, "in its pith and substance," and Act relating to merely Provincial matters falling within s. 92, but related to industrial disputes which might develop into disputes affecting, not only the immediate parties, but the national welfare, peace, order and safety. He cited the analogy of the Australian Constitution Act, which, by s. 51, placed such disputes within the competence of the Australian Parliament when they extended beyond the limits of any single state. He was of opinion that, even if the Dominion legislation actually interfered with Provincial powers, it might be supported if necessary as dealing with the interests of the peace, order and good government of Canada, but he thought that it was necessary to go further in point of principle than to treat *Russell v. The Queen* (1) as showing that, where an abnormal condition in a great emergency demanded it, the Parliament of Canada might legislate for such a case without even trenching on the powers allocated to the Provinces under s. 92. He also thought that the Act was not one to control or regulate contractual or civil rights, but that its object was to authorize inquiry into conditions or disputes, and that the prevention of crimes, the protection of public safety, peace and order, and the protection of trade and commerce, were of its pith and substance and paramount purpose. The Act could also be supported as Dominion legislation under the over-riding enumerated heads of s. 91, as being legislation in relation to the regulation of trade and commerce, and also to the criminal law.

Hodgins J.A. dissented. In his view, industrial strife was nothing more than the result of an undesirable use of the civil right to cease work in the operation of various businesses. The argument in support of the Act was practically an endeavour to invent a new field, which was only a department or development of one of those exclusively possessed by Provincial Legislatures. Nor was the matter made better by the contention that the Act, when examined in the light of the evidence adduced, dealt with a subject which transcended Provincial limits and was of Dominion importance. It was, no doubt, true that owing to the highly

(1) 7 App. Cas. 829.

organized methods of modern labour, strikes might spread and extend to other businesses. This might happen, and the state of things might conceivably reach a height in which it became comparable to war, famine or rebellion, and justify Dominion action. But on the only facts proved, in the learned judge's view, this Act could not be supported as dealing with a case of (1.) emergency, or (2.) general Canadian interest and importance, or (3) with a power conferred under any of the enumerated heads in s. 91. No great national emergency was shown to have existed when the statute was enacted in 1907, or to have occurred since, and the statute was not framed so as to come into operation only when such emergency arose. The statute was further not framed so as to confer the drastic powers that would be necessary in such a case, but was based on the normal working of industrial relations which often required time and patience and some restraint, if dislocation was to be avoided. It was essentially a sedative measure. The special and exceptional conditions of emergency required by the judgments in the *Board of Commerce* case (1) and the *Fort Frances Pulp* case (2) did not appear to him to have existed in point of fact. So far as anticipations of changes in the future were concerned, Hodgins J.A. thought that the question was whether regulation of civil rights or invasion of property rights in the fashion provided by the Act, in order to bring about a uniform and desirable method of dealing with industrial disputes, admirable as its purpose might be, could be valid in view of the exercise of the powers given to the Provinces. That the Provinces had such Powers, as complete as those in this Act given to the Dominion, he entertained no doubt. Several Provinces had on their statute books legislation of much the same kind. Even granting the national importance of the question, the whole success of this method of dealing with it depended on the capacity to seize on local disputes and their conditions, and to manage the exercise of civil rights in relation to them. The circumstance that the dispute might spread to other Provinces was not enough in itself to justify Dominion interference, if such interference affected property and civil rights. The Province in the present case was simply the scene of municipal action. As the result of his

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consideration of the principles laid down for the interpretation of the British North America Act, the learned judge was of opinion that the Act could not stand.

Their Lordships have examined the evidence produced at the trial. They concur in the view taken of it by Hodgins J.A. They are of opinion that it does not prove any emergency putting the national life of Canada in unanticipated peril such as the Board which decided *Russell v. The Queen* (1) may be considered to have had before their minds.

As the result of consideration, their Lordships have come to the conclusion that they ought humbly to advise the Sovereign that the appeal should be allowed, and that judgment should be entered for the appellants for the declaration and injunction claimed. There should be no costs, either of this appeal or in the Courts below, and any costs paid under the judgment of the Appellate Division of the Supreme Court ought to be repaid.

Solicitors for appellants and for the Attorney-General for Ontario: *Blake & Redden*.

Solicitors for respondents and for the Attorney-General for Canada: *Charles Russell & Co.*

(1) 7 App. Cas. 829.

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*Judicial Committee of the Privy Council, Lord Cave, L.C., Viscount Haldane,
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Constitutional Law IA—Rights of Imperial Parliament—Ashburton Treaty—
Preservation of existing provincial right—Transfer to Dominion.

The Ashburton Treaty, 1842, in protecting the existing rights of the Government of New Brunswick to regulate the navigation of the St. John River where both banks are in N.B. did not preclude the Imperial Parliament from transferring that right to the Dominion under the B.N.A. Act.

APPEAL by the plaintiff by special leave from the judgment of the New Brunswick Court of Appeal, affirming a judgment of the Chancery Division whereby certain points of law were determined adversely to the appellant and his action was dismissed. Affirmed.

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The judgment of the Board was delivered by

LORD CAVE, L.C.:—The principal question involved in the proceedings is whether the right to regulate navigation on the St. John River where both banks of the river are within New Brunswick rests with His Majesty in right of the Dominion, or with His Majesty in right of the Province of New Brunswick.

The St. John River takes its rise partly in the State of Maine and partly in the Province of Quebec. For a portion of its course it forms the boundary between Maine and New Brunswick; but its lower course from the Grand Falls to the City of St. John, where it empties into the Bay of Fundy, is wholly in New Brunswick. It is tidal and navigable from its mouth to the City of Fredericton, a distance of about 80 miles. A few miles above the point where the river enters the harbour of St. John it passes through a narrow gorge, and over this gorge there have been thrown 2 passenger bridges (of which one has since been removed) and 2 railway bridges. Of the railway bridges the older was constructed by the respondents, the St. John Bridge & R. Extension Co., under the authority of an Act of the Legislative Assembly of the Province of New Brunswick passed in the year 1881, and was completed in 1886, the height of this bridge above the river being 82 ft. The second railway bridge, which is higher up the gorge, was constructed by the respondents, the C.P.R. Co., with the sanction of the Governor-General of Canada in Council under the Navigable

Imp. Waters' Protection Act, R.S.C. 1906, c. 115, and of the Board
 P.C. of Railway Commissioners under the Railway Act, 1919
 1925. (Can.), c. 68, and was completed (or nearly completed)
 A.-G. OF in November, 1921. The height of this bridge above the
 N.B. river is said to be $84\frac{1}{2}$ ft. at the centre line of navigation, but
 to diminish towards the western bank.

v. On December 7, 1921, the appellant, the Attorney-
 C.P.R. General of the Province of New Brunswick, commenced
 ET AL. these proceedings against the 2 companies, in which he
 Lord Cave, alleged that the 2 railway bridges were an obstruction to
 L.C. the navigation of the river, and claimed to have them
 removed. The companies by their defence (as amended)
 pleaded that the plaintiff had been guilty of laches, and also
 alleged that the claim was bad in law in so far as it alleged
 (among other things):—

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“(1) That the right to regulate the navigation of the
 St. John River where the same flows within the Province of
 New Brunswick is vested in His Majesty as represented by
 the Government of the Province of New Brunswick and
 not in His Majesty in the right of the Dominion of Canada.

“(2) That neither the Department of Public Works of
 Canada nor the Government of Canada had power or
 authority under the Navigable Waters Protection Act or
 otherwise to approve of the plans under which the new
 railway bridge was constructed and that any such approval
 thereof was of no force or effect.

“(3) That the rights (if any) vested in the Province of
 New Brunswick by the Ashburton Treaty cannot or could
 not be altered, varied or withdrawn in whole or in part or
 given or delegated to the Government of Canada or any
 department thereof without the consent of the United States
 of America, the other contracting party to the said treaty.”

At the hearing of the action before Grimmer, J., it was
 agreed by counsel for the parties, with the consent of the
 Court, that the questions of law arising in the case should be
 considered and determined before any questions of fact were
 submitted or considered; and Grimmer, J., after argument,
 decided the points of law against the plaintiff and dismissed
 the action. Upon appeal by the plaintiff to the Appeal
 Division, that Court (consisting of Hazen, C.J., and Barry
 and White, JJ.) agreed with the decision of Grimmer, J.,
 though on somewhat different grounds, and dismissed the

appeal. Special leave was granted to the appellant to appeal to this Board, and the Attorney-General for Canada obtained leave to intervene.

It was hardly disputed by counsel for the appellant that, apart from the argument founded on the Ashburton Treaty (to which reference will be made hereafter), the first and second points of law raised by the defence must have been decided against the appellant. Section 91 (10) of the B.N.A. Act, 1867 gives to the Parliament of the Dominion exclusive legislative authority over navigation and shipping; and by a series of Canadian Statutes, of which the most recent is the Navigable Waters' Protection Act, authority to approve the construction of a bridge over a navigable river has been conferred upon the Governor-General in Council. Further, by s. 248 of the Railway Act, any company desirous of constructing such a bridge is required to obtain the approval of the Railway Board and is authorized to construct the bridge as so approved. It is under these statutes of 1906 and 1919 that the second railway bridge in question in these proceedings was authorized to be made. Further, s. 92 (10) of the Act of 1867 excludes from the jurisdiction of the Provincial Legislatures railways and other works extending beyond the limits of the Province and any works which, although wholly situate within the Province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada; and both the railway bridges in question in these proceedings fall within this exception. By an Act of the Dominion Parliament passed in the year 1883, it was declared that the older railway bridge and the railway crossing it were works for the general advantage of Canada; and the C.P.R., of which the new bridge forms part, of course extends beyond the limits of the Province. *Prima facie*, therefore, not only are the railway bridges under the care and jurisdiction of the Dominion, but the right and power of safeguarding the navigation of the river passing under the bridges is in the same hands.

But it was argued on behalf of the appellant that, having regard to the Ashburton Treaty of 1842, a special construction must be put upon the Act of 1867 and the other statutes above referred to. By that Treaty, which was entered into between Great Britain and the United States of America, the line of boundary between the British Domin-

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ions in North America and the United States was ascertained and agreed, a part of such boundary consisting of the middle line of the main channel of the River St. John. By Article III. of the Treaty, in order to promote the interests and encourage the industry of the inhabitants of the countries watered by the River St. John and its tributaries, whether living within the Province of New Brunswick or the State of Maine, it was agreed that, where by the provisions of the Treaty the River St. John was declared to be the line of boundary, the navigation of that river should be free and open to both parties and should in no way be obstructed by either; that all the produce of the forest or of agriculture (not being manufactured) grown on those parts of the State of Maine watered by the River St. John or its tributaries, should have free access into and through the river to and from the seaport at its mouth, and when within the Province of New Brunswick should be dealt with as if it were the produce of that Province; and that in like manner the inhabitants of the territory of the Upper St. John determined by the Treaty to belong to her Britannic Majesty should have free access to and through the river for their produce in those parts where the river ran wholly through the State of Maine. The Article concluded with a proviso in the following terms:—

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“Provided always that this agreement shall give no right to either party to interfere with any regulations, not inconsistent with the terms of this Treaty, which the Governments respectively of New Brunswick or of Maine may make respecting the navigation of the said river, where both banks thereof shall belong to the same party.”

It is said on behalf of the appellant that the above proviso amounted to a recognition by the British Government, as well as by the Government of the United States, that the power to make regulations respecting the navigation of the River St. John where both banks belonged to New Brunswick rested with the Government of New Brunswick; that this recognition constituted an undertaking or guarantee to the United States that the right to make such regulations should be and remain with the Government of New Brunswick only; that this right had become by virtue of the Treaty part of the municipal law of Canada; and accordingly that s. 91 (10) of the B.N.A. Act, 1867, must be construed in such a manner as not to violate the guarantee so given

to the United States or to interfere with the right of the Province as recognized in the Treaty.

In their Lordships' opinion this argument is misconceived. It may be admitted that Article III. of the Treaty proceeded upon the assumption that the Government of New Brunswick had at the date of the Treaty power to make regulations as to the navigation of the River St. John; but there was no undertaking or guarantee either to the United States or to New Brunswick that this power should remain unaltered. The effect of the proviso was that, if the Government of New Brunswick, in exercise of its powers, should make regulations not inconsistent with the Treaty, the Government of the United States would not interfere with those regulations; but their Lordships are at a loss to understand how such a provision for the protection of the existing powers of the Provincial Government could have created an obligation on the part of the British Government to maintain those powers unaltered for all time. The British Government could, consistently with its engagements to the United States, vest the exclusive power to control the navigation of the river and the erection of bridges over it in the Dominion; and there was certainly no engagement to the Province of New Brunswick which would prevent that from being done. Upon the true and natural construction of the Act of 1867 those powers were so vested in the Dominion, and the change so made involved no violation of the Treaty, but was wholly consistent with it. If any questions arose as to an obligation to the United States, it might be necessary to consider the effect of s. 132 of the Act of 1867; but in fact no such question arises.

For these reasons it appears to their Lordships that the construction of the statutes above referred to was not affected by the Ashburton Treaty, and accordingly that the questions of law were rightly decided in favour of the defendants. In the circumstances the question of laches, which is mainly one of fact, need not be considered. Their Lordships will humbly advise His Majesty that this appeal fails and should be dismissed. The costs of the respondent companies will be paid by the appellant.

Appeal dismissed.

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[PRIVY COUNCIL.]

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AND

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RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ONTARIO,
APPELLATE DIVISION.

Canada—Legislative power of Province—Appointment of Judges—Judicature Act, 1924 (14 Geo. 5, c. 30)—British North America Act, 1867 (30 & 31 Vict. c. 3), s. 96.

The Judicature Act, 1924, of Ontario, s. 2, sub-ss. 2 to 6, and s. 4, sub-ss. 1 and 2, are ultra vires of the Legislature of the Province, since their effect is to authorize the Lieutenant-Governor of the Province to assign (that is to say to appoint) certain judges of the High Court Division of the Supreme Court to be judges of the Appellate Division of that Court, also to designate (that is to say to appoint) certain judges to hold the offices of Chief Justice of Ontario and Chief Justice of the High Court Division, and consequently the provisions are inconsistent with s. 96 of the British North America Act, 1867, under which the powers of appointment referred to are given to the Governor-General of Canada.

Sect. 4, sub-s. 3, however, which provided that upon a vacancy occurring among the judges of the Appellate Division or of the High Court Division before the provisions of the Act came fully into force, the said Divisions were to consist of the remaining judges, was not open to objection.

Judgment of the Appellate Division (56 Ont. L. R. 1) affirmed subject to a modification.

APPEAL (No. 91 of 1924) from a judgment of the Supreme Court of Ontario, First Appellate Division (June 14, 1924), on a question referred to that Court by the Administrator of the Government of Ontario under the Constitutional Questions Act (R. S. Ont., 1914, c. 85).

The question referred was whether the Judicature Act, 1924 (14 Geo. 5, c. 30), was within the authority of the Provincial Legislature.

1925 A.C. p. 751. The effect of the material provisions of that Act, and of the British North America Act, 1867, appear from the judgment of the Judicial Committee.

The Appellate Division, consisting of Mulock C.J.O. and Magee, Hodgins, Masten and Smith J.J.A., gave its

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opinion as follows: "The form of the question does not invite the opinion of the Court as to whether some of said provisions are valid and others invalid, and as s. 9 provides for bringing the whole Act (with the exception of s. 4 previously provided for) into effect by Proclamation, it would seem to be necessary to deal with the Act as a whole in answering the question, which is, therefore, answered in the negative. The Court is of opinion (Hodgins J. dissenting) that sub-s. 2, sub-ss. 3, 4, 5 and 6 of s. 2, and sub-ss. 1, 2 and 3 of s. 4, are not within the legislative authority of the Legislature of the Province of Ontario."

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The judgment of the Appellate Division is reported at 56 Ont. L.R. 1.

1924. Feb. 24. *Tilley K.C. and McGregor Young K.C.* for the appellant.

Clauson K.C., Rowell K.C. and H. Stuart Moore for the respondent.

[Reference was made to *Scott v. Attorney-General for Canada* (1) ; *Attorney-General for Canada v. Attorney-General for Ontario* (2) ; *Piel Ke-ark-an v. The Queen* (3) ; *In re County Courts of British Columbia*. (4)]

Feb. 26. The judgment of their Lordships was delivered by

VISCOUNT CAVE L.C. Their Lordships do not see their way to differing from the decision of the Appellate Division in this case.

The question to be determined in these proceedings is whether the Judicature Act passed by the Legislature of Ontario in the year 1924 was within the powers of the Legislature; and for the purpose of deciding that question it is necessary to refer to certain provisions of the British North America Act, 1867. Sect. 92 of that Act entrusts to the Provincial Legislature the duty of making laws in respect of, among other things, the administration of justice in the Province, including the constitution, maintenance and organization of the Provincial Courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those Courts. Sect. 96 of the same Act provides

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(1) Oct. 18, 1922, unreported.
P.C. Appeal No. 76 of 1922.

(3) (1891) 2 B.C. Rep. 53.
(4) (1892) 21 Can. S.C.R. 446.

(2) [1898] A.C. 247, 254.

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that the Governor-General shall appoint the judges of the Superior, District and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick. Sect. 99 provides that the judges of the Superior Courts shall hold office during good behaviour, and shall be removable by the Governor-General on addresses from the Senate and House of Commons; and under s. 100, the salaries, allowances and pensions of the judges are to be fixed and approved by the Parliament of Canada.

By the Judicature Act, 1924, which is the statute to be considered on this appeal, the Legislature of Ontario (putting it shortly) purported to establish in lieu of the existing Supreme Court of the Province a Supreme Court of Ontario, which was to consist of nineteen judges to be appointed as provided by the Act of 1867. Under the statute the position of the existing judges of the Supreme Court was to be safeguarded, but subject to that provision the judges were to be assigned, some of them to the Appellate Division of the Supreme Court, and the remainder to the High Court Division of the same Court; and under s. 2, sub-s. 5, of the Act the judges were to be so assigned to those two Divisions by the Lieutenant-Governor in Council. Under the same sub-section one of the judges of the Appellate Division was to be designated by the Lieutenant-Governor in Council to be the President of the Appellate Division, and was to be called the Chief Justice of Ontario; and under sub-s. 6 of the same section, one of the judges of the High Court Division was to be designated by the Lieutenant-Governor in Council to be President of that Division, and was to be called the Chief Justice of the High Court Division. Similar provisions are contained in s. 4, sub-ss. 1 and 2, of the Act.

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What is the effect of those provisions? It can hardly be doubted that the result of them is to authorize the Lieutenant-Governor of the Province to assign—that is to say, to appoint—certain judges of the High Court to be judges of the Appellate Division of the Supreme Court, and also to designate—that is to say, to appoint—certain judges to hold the offices of Chief Justice of Ontario and Chief Justice of the High Court Division. If that is the real effect of the statute, as it appears to be, there can be no doubt that the effect of the statute, if valid, would be to transfer the right to appoint the two Chief Justices and the judges of Appeal from the Governor-General of Canada to the Lieutenant-

Governor of Ontario in Council; and if so, it must follow that the statute is to that extent inconsistent with s. 96 of the Act of 1867 and beyond the power of the Legislature of Ontario. This conclusion applies not only to sub-ss. 5 and 6 of s. 2, but also to sub-ss. 2, 3 and 4 of the same section, all of which have reference to the void provisions of sub-ss. 5 and 6 as well as to sub-ss. 1 and 2 of s. 4. Accordingly their Lordships agree with the Appellate Division in holding that sub-ss. 2 to 6 inclusive of s. 1, and sub-ss. 1 and 2 of s. 4 of the Act are invalid; but it does not appear to them that any objection can be taken to sub-s. 3 of s. 4.

Their Lordships will therefore humbly advise His Majesty that this appeal be dismissed, and the order of the Appellate Division confirmed, except so far as it declares sub-s. 3 of s. 4 to be invalid. Their Lordships understand there is no question as to costs.

Solicitors for appellant: *Blake & Redden.*

Solicitors for respondent: *Charles Russell & Co.*

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[PRIVY COUNCIL.]

March 24.

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AND

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RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada (Manitoba)—Legislative Powers of Province—"Direct Taxation"—Tax on Sales of Grain for future Delivery—Tax indirect in certain cases—Stats. of Man., 1923, c. 17—British North America Act (30 & 31 Vict. c. 103), s. 92, head 2.

A tax is not "direct taxation" within s. 92, head 2, of the British North America Act, 1867, unless in substance it is one which is demanded from the person who it is intended should pay it, even if the Act imposing it declares that it is to be a direct tax upon the person who pays.

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p. 562. In answer to questions referred by the Governor-General—namely: (1.) whether the Legislature of Manitoba had authority to enact ch. 17 of its Statutes for 1923, entitled "An Act to provide for the collection of a tax from persons selling grain for future delivery," and (2.) if the Act was ultra vires in certain parts, then in what particulars it was ultra vires:—

Held, that the Act was wholly ultra vires, since in many transactions to which it related the person paying the tax would indemnify himself at the expense of others, and it was not possible to assume that the Legislature intended to pass it in a truncated form.

Cotton v. The King [1914] A.C. 176 and *Burland v. The King* [1922] 1 A.C. 215 followed.

Judgment of the Supreme Court [1924] S.C.R. 571 affirmed.

APPEAL (No. 101 of 1924) by special leave from a judgment of the Supreme Court of Canada (May 13, 1924) in the matter of a reference to that Court by the Governor-General under s. 60 of the Supreme Court Act.

The questions referred to the Supreme Court were:—

(1.) Had the Legislature of Manitoba authority to enact ch. 17 of its Statutes of 1923, entitled "An Act to provide for the collection of a tax from persons selling grain for future delivery"?

(2.) If the said Act be, in the opinion of the Court, ultra vires in part only, then in what particulars is it ultra vires?

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The material terms of the Act, and the nature of the transactions to which it related, appear from the judgment of the Judicial Committee.

The Supreme Court answered the first question in the negative. In view of that answer, no answer was made to the second question. The proceedings are reported at [1924] S.C.R. 371.

1925. March 3. *Tilley K.C.* and *Hon. Geoffrey Lawrence* for the appellant.

Clauson K.C. and *T. Mathew* for the respondent the Attorney-General for Canada.

Lafleur K.C. for the respondents the Attorneys-General for Saskatchewan and Alberta.

As to the meaning of the words "direct taxation" in s. 92, head 2, of the British North America Act, 1867, reference was made to *Attorney-General for Quebec v. Queen Insurance Co.* (1) ; *Attorney-General for Quebec v. Reed* (2) ; *Bank of Toronto v. Lambe* (3) ; *Brewers' and Maltsters' Association v. Attorney-General for Ontario* (4) ; *Cotton v. The King* (5) ; *Burland v. The King*. (6)

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March 24. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. This case comes by way of appeal from the Supreme Court of Canada. To that Court the Governor-General of Canada had, under a statutory power, referred two questions relating to the constitutional validity of a taxing statute passed by the Legislature of Manitoba. The questions were as follows:—

First, had the Legislature of Manitoba authority to enact ch. 17 of the Statutes of 1923, entitled "An Act to provide for the collection of a tax from persons selling grain for future delivery?"

Secondly, if the said Act be, in the opinion of the Court, ultra vires in part only, then in what particulars is it ultra vires?

Under the British North America Act of 1867 a Provincial Legislature may exclusively make laws relating to direct

- (1) (1878) 3 App. Cas. 1090.
- (2) (1884) 10 App. Cas. 141.
- (3) (1887) 12 App. Cas. 575.

- (4) [1897] A.C. 231.
- (5) [1914] A.C. 176.
- (6) [1922] 1 A.C. 215.

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taxation within the Province for raising revenue for Provincial purposes. Such a Legislature is given no power to levy a tax which is indirect.

The Supreme Court of Canada (consisting of Idington, Duff, Anglin, Mignault and Malouin JJ.) answered the questions submitted to them, in the sense that the Act was *ultra vires*. Anglin J., however, took no part in the judgment.

In order to appreciate the question raised it is necessary to set out the relevant sections of the statute of Manitoba under discussion, the Grain Futures Taxation Act. After defining "grain" as meaning wheat, oats, barley, rye and flaxseed, and "agreement of sale" or "agreement to sell" as covering options, calls in, puts and calls, and offers, indemnities and privileges; and "exchange" as including all agencies, boards of trade, bourses, auction or other meeting places, at which grain and other products or merchandise are publicly bought, sold, bid for, offered or exchanged, for future delivery or contracts for such future delivery are made, the statute provides (s. 3):—

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"That upon every contract of sale of grain for future delivery made at, on or in any exchange, or similar institution or place in Manitoba, except as hereinafter provided, the seller or his broker or agent shall pay to His Majesty for the public use of the Province a tax computed upon the gross quantities of grain sold or agreed to be sold, as follows: Upon every thousand bushels of flaxseed, 12 cents; upon every thousand bushels of wheat, 6 cents; upon every thousand bushels of oats, barley or rye, 3 cents.

4. No such tax shall be payable in any case in which—

- (a) the seller is the grower of the grain, or
- (b) either party to the contract is the owner or tenant of the land upon which the grain is to be grown, or
- (c) the sales are cash sales of grain or other products or merchandise which in good faith are actually intended for immediate or deferred delivery (such transactions for the purposes of this Act to be evidenced by the actual transfer of the tickets, storage or warehouse receipts, bills of lading or lake shippers' clearance receipts, or other documents of title for grain transferring actual ownership from

the vendor to the purchaser in exchange for the price at the maturity of the contract), or

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- (d) the sales are 'transfer' or 'scratch sales' or 'passouts,' provided that the purchase and sale are made at the same exchange, on the same day, at the same price, and for the account of the same person, or
- (e) the sales are made by a broker on account of a principal, and the name of the principal is not disclosed to the buyer, provided the principal sells to the broker the same quantity and the same grade and kind of grain at the same price, on the same day, on the same exchange, the only tax in this case being the tax payable by the principal.

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5. The tax imposed by this Act shall be a direct tax upon the person actually entering into the contract of sale, whether such person is the principal in the contract or is acting only in the capacity of a broker or agent for some other person and is imposed solely in order to supplement the revenues of this Province.

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6. (1.) The tax hereby imposed shall be payable in cash by the seller, his broker or agent, in each case, and every person liable to pay such tax shall send to the minister, not later than the 10th day of each month, a return showing the particulars of all sales made by him during the preceding calendar month in respect of which any tax is imposed upon him by this Act, accompanied by payment of the total amount of all such taxes."

An agreed statement of facts put in by the Attorneys-General concerned shows the course of business in the sale and disposal of grain to which the Act may apply. From this statement it appears that the ultimate market price for grain in Canada and Western America, the producing countries, is determined in the great importing markets in Great Britain and Europe. This is a "world price," which is but little controlled by the producers, and which has to be looked to to cover all the items in cost of production and of transportation. The landowner or farmer who produces the grain sells it to a country elevator manager, or may deliver it to him for warehousing. The purpose is to sell the grain so as to make a profit on the fluctuating world market price. Whoever has to make the sale naturally tries to get the best price of the moment. It may not be

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wise to sell at once. He accordingly watches the market. But he desires to avoid possible loss from a drop in market price while he is watching his opportunity. To guard against this he "hedges" by selling on the Winnipeg Grain Exchange for future delivery an equivalent quantity of grain. His aim in this is to eliminate the risk which he runs from fluctuations in the general market price while waiting to sell what he actually possesses. This he forwards to a terminal elevator and sells at a suitable moment for cash. He then extinguishes his obligation on the sale of the "future" which he has already made as insurance by purchasing on the Winnipeg Exchange an equal quantity for future delivery, thus extinguishing his liabilities as regards the two obligations in the future. These are cancelled out in the books of the clearing house in Winnipeg, and, as he has now sold for cash what he actually held, the risk from fluctuation of price is at an end.

There are minor variations and differences in form which affect classes of transactions upon this principle of insurance by future dealing. But the practice does not vary in its substantial aspect, and it is a characteristic one. Obviously, it involves much employment of brokers and mere agents to carry it out, and these, it is agreed, charge any tax on the transaction to the customer as part of the expenses incurred.

The question which arises is whether the tax imposed by the statute is, in the light of these facts, direct or indirect.

As to the test to be applied in answering this question, there is now no room for doubt. By successive decisions of this Board the principle as laid down by Mill and other political economists has been judicially adopted as the test for determining whether a tax is or is not direct within the meaning of sec. 92, head 2, of the British North America Act. The principle is that a direct tax is one that is demanded from the very person who it is intended or desired should pay it. An indirect tax is that which is demanded from one person in the expectation and with the intention that he shall indemnify himself at the expense of another. Of such taxes excise and customs are given as examples.

It does not exclude the operation of the principle if, as here, by s. 5, the taxing Act merely expressly declares that the tax is to be a direct one on the person entering into the

contract of sale, whether as principal or as broker or agent. For the question of the nature of the tax is one of substance, and does not turn only on the language used by the local Legislature which imposes it, but on the provisions of the Imperial statute of 1867. In *Cotton v. The King* (1), followed in *Burland v. The King* (2), this Board held that in the case of a Provincial succession duty, intended to be collected from a person concerned, it might be, merely with the administration of a testator's estate, who had been obliged by law to make a declaration of the particulars of that estate for taxation to be payable by him personally, and who was naturally entitled to recover the amount paid from the persons succeeding to the estate, the taxation was ultra vires. A probate duty (as distinguished from such a succession duty), paid as the price of services to be rendered by the Government and imposed on the person claiming probate, might, it was indicated, on the other hand, well be direct taxation. In *Attorney-General for Quebec v. Reid* (3) Lord Selborne had laid down an analogous application of the same principle. *Bank of Toronto v. Lambe* (4) is another case in which Lord Hobhouse, applying the same principle, found the tax to be direct. In *Brewers' and Maltsters' Association v. Attorney-General for Ontario* (5) Lord Herschell, in delivering the opinion of the Board, followed this case on the ground that the licence tax in question was demanded from the very person who it was intended or desired should pay it, as a tax on his licence with no expectation or intention that he should indemnify himself at the expense of any other person.

On the scope of the taxation imposed by the Act now under consideration there is little room for doubt. The tax is not a licence tax; it is one to be levied upon the contracts made for the sale of grain for future delivery. There is exemption when the seller under the contract is the grower of the grain, and when either party to the contract is the owner or tenant of the land on which the grain is to be grown; but in nearly every other case the person entering into a contract of sale for future delivery has to pay a tax proportionate to the quantity sold. It is obvious that this liability will extend, not only to brokers and mere agents, but to factors,

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(3) 10 App. Cas. 141.

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such as elevator companies, to whom the possession of grain has been entrusted for sale. The agreed statement says in its conclusion that the grain business has many ramifications, all of which fall within the kind of transaction it describes, but all of which the statement does not attempt to specify. To a large number of these the exemptions may not apply. If, therefore, the statute seeks to impose on the brokers and agents and the miscellaneous group of factors and elevator companies who may fall within its provisions, a tax which is in reality indirect within the definition which has been established, the task of separating out these cases of such persons and corporations from others in which there is a legitimate imposition of direct taxation, is a matter of such complication that it is impracticable for a Court of law to make the exhaustive partition required. In other words, if the statute is ultra vires as regards the first class of cases, it has to be pronounced to be ultra vires altogether. Their Lordships agree with Duff J. in his view that if the Act is inoperative as regards brokers, agents and others, it is not possible for any Court to presume that the Legislature intended to pass it in what may prove to be a highly truncated form.

Turning to the only remaining question, whether the tax is in substance indirect, and bearing in mind that by s. 5 the liability is expressed as if it were to be a personal one, it is impossible to doubt that the tax was imposed in a form which contemplated that some one else than the person on whom it was imposed should pay it. The amount will, in the end, become a charge against the amount of the price which is to come to the seller in the world market, and be paid by some one else than the persons primarily taxed. The class of those taxed obviously includes an indefinite number who would naturally indemnify themselves out of the property of the owners for whom they were acting.

This view makes it unnecessary to consider the further point raised in the judgment of Idington J., that the taxing Act was passed in violation of the provision in s. 121 of the British North America Act, that all articles of the growth, produce or manufacture of any one of the Provinces shall be admitted free into each of the other Provinces. On this point their Lordships refrain from expressing any opinion.

The Supreme Court of Canada answered the first question in the negative and treated the second as not arising.

Their Lordships will humbly advise His Majesty that these were the proper answers and that the appeal should be dismissed. In accordance with the usual practice there will be no costs.

Solicitors for appellant: *Blake & Redden*.

Solicitors for respondents: *Charles Russell & Co.*

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| LORD'S DAY ALLIANCE OF CANADA..... | } | APPELLANTS; |
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| ATTORNEY-GENERAL FOR MANITOBA..... | } | RESPONDENT. |
| ATTORNEY-GENERAL FOR CANADA..... | } | INTERVENER. |

ON APPEAL FROM THE COURT OF APPEAL OF MANITOBA.

Canada (Manitoba)—Provincial Legislative Powers—Sunday Excursions—Lord's Day Act (R.S. Can., 1906, c. 153), s. 8—Lord's Day (Amendment) Act (Stat. Man., 1923, c. 25), s. 1—British North America Act, 1867 (30 & 31 Vict. c. 3), s. 91, head 27; s. 92, heads 13, 16.

The Lord's Day Act (R.S. Can., 1906, c. 153) made it a punishable offence to run or conduct Sunday excursions "except as provided by any provincial Act or law now or hereafter in force." An Act passed by the Legislature of Manitoba in 1923 to amend the Lord's Day Act of that Province (R.S. Man., 1913, c. 119), enacted by s. 1 that it should be lawful to run or conduct Sunday excursions to resorts within the Province. Sunday excursions were not unlawful by the laws of England existing in 1870, which were part of the law of Manitoba by 51 Vict. c. 33 (Dom.):—

Held, that the Manitoba statute of 1923 being merely permissive and not dealing with a matter brought within the criminal law, was competent to the Provincial Legislature under the British North America Act, 1867, s. 92, heads 13, 16; and, that being so, the Act was a provincial Act "now or hereafter in force" within the meaning of the Lord's Day Act of Canada. It was unnecessary to consider whether the Act of 1923 could be justified as Dominion legislation by delegation or reference.

Attorney-General for Ontario v. Hamilton Street Ry. Co. [1903] A.C. 524 distinguished.

Judgment of the Court of Appeal affirmed.

APPEAL (No. 52 of 1923) from a judgment of the Court of Appeal of Manitoba (May 23, 1923) upon questions referred to that Court by the Lieutenant-Governor of the Province under R. S. Man., 1913, c. 38.

The questions referred to the Court of Appeal were in substance as to the validity of a statute enacted by the Legislature of Manitoba in 1923 dealing with the subject of the running of Sunday excursions within the Province.

**Present*: VISCOUNT CAVE L.C., LORD DUNEDIN, LORD CARSON, LORD BLANESBURGH, and MR. JUSTICE DUFF.

The questions, the answers returned by the Court of Appeal, and the statutory provisions relevant to the case appear from the judgment of the Judicial Committee.

1924. July 14, 15, 16. *Rowell K.C.* and *Bergman K.C.* for the appellants. A Provincial Act is not one "in force" within the meaning of the Lord's Day Act (R.S. Can., 1906, c. 153), s. 8, unless it is an Act intra vires the Provincial Legislature under the British North America Act. Having regard to the decision of the Board in *Attorney-General for Ontario v. Hamilton Street Ry. Co.* (1), and to that of the Supreme Court of Canada in *Ouimet v. Bazin* (2), the Act of 1923 was ultra vires, as it related to the criminal law, a subject reserved to the Dominion Legislature by s. 91, head 27. Sect. 92, head 16, does not give a Provincial Legislature power to modify the criminal law unless it is Provincial criminal law within that head. Many acts involved in the excursions purported to be allowed would be infractions of 29 Car. 2, c. 7, s. 1, which formed part of the law of Manitoba by 51 Vict. c. 33 (Dom.). *Reg. v. Silvester* (3) does not conflict with that view. Further, the railways operating in Manitoba are Dominion railways within s. 92, head 10 (c), of the Act of 1867, and thereby outside the sphere of Provincial legislation.

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E. L. Newcombe K.C. for the Attorney-General for Canada supported the appellants; he contended that the Dominion Legislature could not confer upon a Provincial Legislature power to legislate upon a matter as to which power is given by the British North America Act to the Dominion; he referred to observations by Lord Watson in the course of *Canadian Pacific Ry. Co. v. Notre Dame de Bonsecours* (4) mentioned at p. 7 of Lefroy's Canadian Federal System (1913).

R. W. Craig K.C. and *Hon. Geoffrey Lawrence* for the respondent. The Act of 1923 was intra vires, since it was permissive and not restrictive or criminal, and was within s. 92, heads 13 and 16. The judgments in *Ouimet v. Bazin* (2) show that had the Act then under consideration been merely permissive it would have been held to be intra vires. Sunday excursions were not prohibited by the Dominion Lord's Day Act, nor by 29 Car. 2, c. 7; the subject

(1) [1903] A.C. 524.

(2) (1906) 46 Can. S.C.R. 502.

(3) (1864) 33 L.J. (M.C.) 79.

(4) [1899] A.C. 367.

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was therefore outside the domain of the criminal law. The Act of 1923 merely declared the common law. Sect. 5 of the Dominion Lord's Day Act was not a delegation of the legislative power, but was legislation by adoption or reference; the provision in the Act of 1923 was in effect Dominion legislation. [On the question of delegation or reference the following cases were cited: *Powell v. Apollo Candle Co.* (1); *Valin v. Langlois* (2); *In re Gray*. (3)]

Rowell K.C. in reply referred to *R. v. Sam Bow* (4) and *In re Jorgensen*. (5)

Dec. 22. The judgment of their Lordships was delivered by

1925 A.C.
p. 387. LORD BLANESBURGH. This appeal, relating to the permissibility or otherwise of certain Sunday excursions within the Province of Manitoba, raises important questions as to the legislative powers in relation to such matters possessed by the Parliament of Canada on the one hand and the different Provincial Legislatures on the other. Is it open to a Provincial Legislature to permit such excursions within its own Province? Or, is such a matter, even in this aspect of it, now parcel of the criminal law, so as to be within the legislative competence of the Dominion Parliament alone? These, it will be found, are the broad questions which emerge on this appeal.

They arise upon a statute passed by the Legislature of Manitoba in the session of 1923. The statute is intituled "An Act to amend the Lord's Day Act" of the Province, being c. 119 of the Revised Statutes, 1913, and it provides in s. 1 for the addition to that Act of a clause making it lawful "For any person or corporation on the Lord's Day to run, conduct or convey by any mode of conveyance any excursion on which passengers are conveyed for hire to summer resorts, beaches or camping grounds within the Province, notwithstanding anything to the contrary in that or any other Act of the Legislature of Manitoba or in any law in force in the Province over which the Province has legislative authority."

Sect. 2 amends s. 2 of the principal Act by adding these same excursions to the works of necessity and charity which

(1) (1885) 10 App. Cas. 282.

(2) (1879) 5 App. Cas. 115.

(3) (1918) 57 Can. S.C.R. 150.

(4) (1918) 27 Brit. Col. R. 234.

(5) (1923) 2 West. Weekly Reporter, 600.

by that section are put outside the prohibition of the statute. The Act was not at once to be operative. It was to be brought into force only on proclamation by the Lieutenant-Governor in Council, and before that step had been taken the following questions were, on April 19, 1923, under the authority conferred by c. 38 of the Revised Statutes of Manitoba, referred by His Honour in Council to the Court of Appeal of the Province for hearing and consideration:—

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"1. Is it lawful in Manitoba for any person or corporation on the Lord's Day to run, conduct or convey by any mode of conveyance any excursion on which passengers are conveyed for hire to summer resorts, beaches or camping grounds within the Province, assuming that 'An Act to amend the Lord's Day Act' enacted at the present session of the Manitoba Legislature has been duly brought into force on proclamation by the Lieutenant-Governor-in-Council?"

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"2. Are either or both of ss. 1 and 2 of an 'Act to amend the Lord's Day Act' passed at the present session of the Manitoba Legislature valid, assuming that the said Act has been duly brought into force on proclamation by the Lieutenant-Governor-in-Council?"

"3. Is the 'Lord's Day Act,' being c. 119 of 1913 Revised Statutes of Manitoba, as amended by 'An Act to amend the Lord's Day Act,' passed at the present session of the Manitoba Legislature, within the legislative jurisdiction and powers of the Legislature of Manitoba, assuming that the last-mentioned Act has been duly brought into force on proclamation by the Lieutenant-Governor-in-Council?"

"4. If the answer to question 3 is 'No,' in which particular respect has the Legislature exceeded its powers?"

It will be observed that each of these questions is concerned with a state of things resulting from the new Act being duly brought into force. The Lieutenant-Governor-in-Council expresses a desire to be informed as to the legality of the excursions to which he refers only on the assumption that that Act has been made operative, and no question as to their legality apart from the Act is propounded. Their Lordships were, however, strongly urged by the appellants to deal with and dispose of the view that such excursions were lawful in Manitoba independently of the Act altogether—a view expressed by some of the

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- learned judges of the Court of Appeal in this case and foreshadowed in an earlier decision of the same Court.
- Their Lordships will refrain from taking this course, for one compelling reason, which they name out of several which would justify reserve in this matter.
- Statutes empowering the executive Government, whether of the Dominion of Canada or of a Canadian Province, to obtain by direct request from the Court answers to questions both of fact and law, although intra vires of the respective Legislatures, impose a novel duty to be discharged, but not enlarged by the Court: see *Attorney-General for Ontario v. Attorney-General for Canada*. (1) It is more than ordinarily expedient in the case of such references that a Court should refrain from dealing with questions other than those which on excessive responsibility are in express terms referred to it, and their Lordships will here act upon that view.

On May 23, 1923, the Court of Appeal for Manitoba formally certified its answers to the questions. Its answer to the first was in the affirmative, and to the second question its effective answer was that s. 1 of the Act being valid, s. 2 was inoperative and unnecessary.

Following upon these answers the Act was brought into force by proclamation, and the present appeal from the certificate of the Court of Appeal has been by special leave of that Court presented by the Lord's Day Alliance of Canada, supported by the Attorney-General of the Dominion, who has by leave intervened in the proceedings and been made a respondent to the appeal.

It may be assumed that the Provincial Legislature, in passing the Act of 1923, was purporting to exercise the power which it treated as being reserved to it by s. 8 of the statute of the Dominion—the Lord's Day Act, 1906. That section is as follows: "It shall not be lawful for any person on the Lord's Day, *except as provided by any provincial Act or law now or hereafter in force*, to run, conduct or convey by any mode of conveyance any excursion on which passengers are conveyed for hire and having for its principal or only object the carriage on that day of such passengers for amusement or pleasure, and passengers so conveyed

(1) [1912] A.C. 571.

shall not be deemed to be travellers within the meaning of this Act."

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The real question raised on this appeal may therefore be thus phrased: "Is the Manitoba Act of 1923, now duly proclaimed, 'a Provincial Act hereafter in force' within the meaning of s. 8 of the Lord's Day Act, 1906?" The full significance of these words can perhaps best be appreciated if some consideration be first given to the legislative history in Canada of this question of Sunday observance since the passing of the British North America Act in 1867.

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That history has been somewhat disturbed. For many years after 1867 it was apparently assumed on all hands that the power of legislating with reference to Sunday observance within a Canadian Province was by s. 92 of the Act exclusively committed to the Provincial Legislature as being either a matter (s. 92, head 13) relating to property and civil rights in the Province or as being one (s. 92, head 16) of a merely local or private nature in the Province. It was assumed also that appropriate penalties for the non-observance of Sunday might under s. 92, head 15, be enacted by the Provincial Legislature as a means of enforcing a law of the Province made in relation to a matter coming within a class of subjects enumerated in the section. So widely held was this view that not only was no Dominion statute with reference to this subject ever promulgated, but in most of the Provinces legislation was passed having for its object the compulsory observance of Sunday within the Province or the laying down of rules of conduct to be followed on that day, accompanied by appropriate sanctions for non-observance or breach. The Lord's Day Act, 1902, of Manitoba is one of these Provincial statutes: The Ontario Act of 1897, c. 246, "An Act to Prevent the Profanation of the Lord's Day," is another.

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It was not until 1902 that the validity of any of these enactments was called in question. In that year, however, the Court of Appeal of Ontario were asked whether the Ontario statute was valid, and although the enactment was upheld in that Court, on appeal to this Board it was decided by their Lordships that the Act, *treated as a whole*, was beyond the competency of the Ontario Legislature. The ground of the decision was that an infraction of the Act was an offence against the criminal law, and that the criminal law in its widest sense is by s. 91, head 27, of the

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British North America Act reserved for the exclusive legislative authority of the Parliament of Canada: see *Attorney-General for Ontario v. Hamilton Street Ry. Co.* (1) Subsequent decisions in Canada showed that in this respect no valid distinction could be drawn between the Ontario statute and other prohibitory statutes with reference to Sunday observance passed by other Provincial Legislatures, and accordingly it was deemed necessary by the Parliament of Canada itself to deal by legislation with the subject, and the Dominion Act (R.S.), 1906, c. 153, to which reference has already been made, was the result.

The form of that statute is notable. Some of its prohibitions are general and unqualified, as, for example, shooting on Sunday (s. 10), or sale of foreign newspapers on that day (s. 11). Other prohibitions—those, for instance, contained in ss. 5 and 7 and in s. 8, above set forth—are each qualified by the phrase or its equivalent, “except as provided by any provincial Act or law now or hereafter in force.” Lastly, there are a great number of activities, stated by the statute to be included in the general expression, “works of necessity or mercy,” but many of which, apart from that statutory inclusion, would not naturally be so described, as to which there is no prohibition at all.

The circumstances calling for the Act supply clearly enough the explanation of its content. The Act is laying down for the whole of Canada regulations for the observance of Sunday. Some things on that day are everywhere prohibited; others are everywhere allowed. But there is an intermediate class of activities—Sunday excursions are amongst them—with reference to which the Act recognizes that differing views may prevail in the respective Provinces of the Dominion, so varying in these Provinces are the circumstances, usages and predominant religious beliefs of the people. The Act proceeds to provide accordingly, putting it generally, that with reference to these matters, Provincial views shall within a Province prevail. As Anglin J. observed in *Ouimet v. Bazin* (2), this course was no doubt adopted “to enable local bodies to deal with peculiar requirements of localities with which they would presumably be more familiar and perhaps more in sympathy.”

(1) [1903] A.C. 524.

(2) 46 Can. S.C.R. 502, 530.

There is therefore reserved to each Province power in these intermediate cases by (inter alia) "a Provincial Act . . . hereafter in force" to exempt that Province from the operation of the general prohibition in whole or in part.

Now, in their Lordships' judgment, a Provincial Act passed subsequently to the passing of this statute, if it is to be "in force" within the meaning of the reservation, must be one effectively enacted by the Provincial Legislature, and the solution of the problem whether the statute of Manitoba now under consideration, and in particular s. 1, is in that sense of these words "in force" in the Province, will be simplified if it be first asked whether or not it would have been within the competence of the Legislature of Manitoba effectively to enact it had there been on this subject of Sunday excursions no previous Dominion legislation at all.

To this question no other than an affirmative answer can, their Lordships think, be given. The argument to the contrary proceeds upon a view of *Attorney-General for Ontario v. Hamilton Street Ry. Co.* (1) decision, which they conceive is not admissible. The Board dealing there with the Ontario Act as a whole—as an Act which created offences and imposed penalties for their commission—held that such a statute was part of the criminal law, and, as such, exclusively within the competence of the Parliament of Canada. But the Board was not considering the power of a Provincial Legislature to recognize what may be called the non-observance of Sunday as distinct from its assumption of power to enforce by penalties or punishment the observance of that day. And the two things are very different. Legislative permission to do on Sunday things or acts which persons of stricter sabbatarian views might regard as Sabbath-breaking is no part of the criminal law where the acts and things permitted had not previously been prohibited. Such permission might aptly enough be described as a matter affecting "civil rights in the Province" or as one of "a merely local nature in the Province." Nor would such permission necessarily be otiose. The borderline between the profanation of Sunday—which might at common law be regarded as an offence and therefore within the criminal law—and the not irrational observance of the

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day is very indistinct. It is a question with reference to which there may be infinite diversity of opinion. Legislative permission to do on Sunday a particular act or thing may, therefore, amount to a useful pronouncement that within the Province the acts permitted are on the one side of the line and not on the other. In the present case, as it happens, no objection could have been taken to the section under consideration on the ground that Sunday excursions were in Manitoba unlawful or criminal. They were not. They had never, according to the present assumption, been specifically prohibited by the Parliament of Canada. They were not unlawful by the laws of England existing on July 15, 1870, from which day the Dominion Parliament, by 51 Vict. c. 33, introduced into Manitoba such of these laws as related to matters within the jurisdiction of the Parliament of Canada. It follows that, prior to the Dominion Act of 1906, Sunday excursions were not in Manitoba the subject of prohibition. Enacted, therefore, by the Provincial Legislature before that statute, s. 1 of the Manitoba Act of 1923 would, in the opinion of their Lordships, have been *intra vires* and effective. The section would have been "in force" in the Province in the fullest meaning of these words, as found in the Act of 1906. And the section, if then in "force," would have so continued notwithstanding the passing of that Act. It would have been a "Provincial Act . . . now in force."

As Duff J. says in *Ouimet v. Bazin* (1), when speaking of the Lord's Day Act, 1906: "This latter enactment appears to be framed upon the theory that the provinces may pass laws governing the conduct of people on Sunday; and by the express provisions of the Act such laws, if in force when the Act became law, are not to be affected by it. That is a very different thing from saying that in this Act the Dominion Parliament has manifested an intention to give the force of law to legislation passed by a provincial legislature professing to do what a province under its own powers of legislation cannot do, viz., to create an offence against the criminal law within the meaning of the enactments of the 'British North America Act' already referred to." With those observations the Board is in entire agreement.

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But his Lordship was there dealing only with Provincial laws in force when the Act of 1906 was passed. The same principle, however, as it seems to the Board, must apply to Provincial statutes subsequently enacted. That the Parliament of Canada so intended is clear from the language it has used, and there seems no valid reason why that intention should not have effect. The Dominion Legislature, of course, may at any moment by prohibiting Sunday excursions under appropriate sanctions bring these within the domain of the criminal law and thereby at once withdraw such activities entirely from the cognizance of the Legislature of any Province. But what the Parliament of Canada may do in this matter it may also forbear to do, and permissive Provincial legislation effective for its purpose, because the Parliament of Canada has not previously intervened at all, can be no less effective after such intervention if by its very terms the previous liberty of the Provinces in this matter remains unaffected. In each case the Provincial Legislature is exercising a power which, in the one case by silence and in the other case in words, the Parliament of Canada has left intact.

In this view of the matter it becomes unnecessary for their Lordships to consider, as some of the learned judges of the Court of Appeal have done, whether such Provincial legislation as that now in question may be justified as being in effect Dominion legislation by delegation or reference. They prefer, without saying more on that matter, to justify it on the grounds they have set forth.

In the result their Lordships agree with the Court of Appeal that the first question of the Lieutenant-Governor-in-Council should be answered in the affirmative.

The learned judges of that Court preface their answer to the second question, already given, by a statement to the effect that, as s. 2 of the Manitoba Lord's Day Act is prohibitive and provides a penalty for every breach, it invades the field of criminal legislation and is ultra vires under the decision in the *Hamilton Street Ry.* case (1), and they go on to say that adding an exception of something valid from a constitutional standpoint to a section that is ultra vires does not give validity to the section itself. Their Lordships agree with the Court of Appeal in thinking

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that s. 2 of the Manitoba Lord's Day Act is, under the *Hamilton Street Ry.* case (1), ultra vires the Provincial Legislature, and they do not find it necessary to consider or determine whether the amendment of the section by the Act of 1923 might be severed from and stand independent of that enactment, for in the present case the whole question is academic. Sect. 2 of the statute of 1923 adds nothing effective to s. 1, and need not be regarded. Their Lordships, therefore, are content merely to express their agreement with the actual answer given to that question by the Court of Appeal.

To the third question the answer of the Court of Appeal was as follows: "This Court is unable to distinguish c. 119 of the Revised Statutes of Manitoba, 1913, as it stood before the proposed amendments from the Act pronounced by the Privy Council in *Attorney-General for Ontario v. Hamilton Street Ry. Co.* (1), to be ultra vires of the Provincial Legislature. As to the amending Act submitted, this Court has above expressed the opinion that s. 1 thereof is valid and that s. 2 thereof is inoperative and unnecessary." With the first part of this answer their Lordships, for reasons which already sufficiently appear in this judgment, are in entire agreement, and they have already expressed themselves in regard to the statement referred to in the second part.

The Court of Appeal deemed it to be superfluous to answer the fourth question, as do their Lordships.

In the result, their Lordships agreeing in effect with all the answers of the Court of Appeal are of opinion that this Appeal from the judgment of that Court should be dismissed. They will humbly advise His Majesty accordingly.

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Their Lordships do not propose to make any order with reference to the costs of the appeal. They think that all parties to it should bear their own.

Solicitors for appellant and intervener: *Charles Russell & Co.*

Solicitors for respondents: *Blake & Redden.*

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ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada (Quebec)—Succession Duty—Situation of Property—Shares registered and transferable outside Province—"Transmission"—Quebec Succession Duty Act (4 Geo. 5, c. 9), arts, 1375, 1376.

A banking company, the head office of which was at Montreal in the Province of Quebec, had power by statute to maintain in any Province a registry office at which alone shares held by residents in that Province were to be registered and could validly be transferred. A person who was resident and domiciled at Halifax in the Province of Nova Scotia, died there owning shares in the bank, the shares being registered at an office maintained by the company at Halifax under the above statutory power.

Succession duty in respect of the shares was claimed under the Quebec Succession Duty Act (R.S. Queb., 1909, as amended by 4 Geo. 5, c. 9 (Queb.)); by art. 1376 of the Act as amended the duty was imposed upon "property actually situate within the Province . . . whether the transmission takes place within or without the Province":—

Held, that as the ownership of the shares could be effectively dealt with only in Nova Scotia, they were not property situate in Quebec, and the claim could not be maintained.

The word "transmission" in art. 1376 is used to express the legal result which follows the death, not to express the actual steps necessary to invest the new owner.

Attorney-General v. Higgins (1857) 2 H. & N. 339 approved.

Judgment of the Supreme Court affirmed.

APPEAL (No. 105 of 1923), by special leave, from a judgment of the Supreme Court of Canada (June 15, 1923), reversing (so far as is material to this report) a judgment of Court of King's Bench for Quebec (June 28, 1922), which affirmed a judgment of the Superior Court of that Province.

The respondents were the administrators of the estate of one Wiley Smith, who was domiciled and resident at Halifax, in the Province of Nova Scotia, and died there in 1916 intestate. The appellant was the collector of succession duty in the Province of Quebec.

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*Present: VISCOUNT HALDANE, LORD DUNEDIN, LORD ATKINSON, LORD WRENBURY, and LORD SALVESEN.

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The only question in the appeal was whether the respondents were liable to pay succession duty under the Quebec Succession Duty Act (R.S. Queb., 1909, as amended by 4 Geo. 5, Queb., c. 9), in respect of 2076 shares in the Royal Bank of Canada forming part of the estate of the deceased.

The material facts and statutory provisions appear from the judgment of the Judicial Committee.

The Treasurer for the Province of Nova Scotia had recovered judgment in the Supreme Court of Nova Scotia, which judgment had been affirmed by the Supreme Court of Canada (see *Smith v. Provincial Treasurer of Nova Scotia* (1)), for succession duty in the Province of Nova Scotia in respect of the shares in question.

In the present case the Supreme Court of Canada (consisting of Davies C.J., and Idington, Duff, Anglin, Brodeur, and Mignault JJ.) held (2) that that Court was bound by its decision above referred to, and accordingly dismissed the claim for Quebec succession duty so far as it related to the bank shares.

1924. Nov. 25. *Geoffrion K.C.* and *Hon. Geoffrey Lawrence*, for the appellant, referred to *Smith v. Provincial Treasurer of Nova Scotia* (1); *Attorney-General v. Higgins* (3); *Attorney-General v. Lord Sudeley* (4); *In re Clarke* (5); *New York Breweries Co. v. Attorney-General* (6); *Hughes v. Rees* (7); and *Dicey on Conflict of Laws*, 3rd ed., pp. 342-344.

Wilfrid Greene K.C. and *Hon. Stafford Cripps* for the respondents were not called upon.

Dec. 22. The judgment of their Lordships was delivered by

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p. 373. LORD DUNEDIN. Mr. Wiley Smith died on February 28, 1916, domiciled in Nova Scotia and intestate. The respondents are his administrators appointed by the Probate Court of Halifax in Nova Scotia. Part of his property consisted of shares in the Royal Bank of Canada. The appellant, who was the plaintiff in the action, is the collector of suc-

(1) [1919] 58 Can. S.C.R. 570.

(2) [1923] S.C.R. 578.

(3) 2 H. & N. 339.

(4) [1896] 1 Q.B. 354.

(5) [1904] 1 Ch. 294.

(6) [1899] A.C. 62.

(7) (1884) 5 Ont. R. 654.

cession duties in the Province of Quebec, and he sues the respondents for succession duty in respect of these shares. He bases his claim on arts. 1375 and 1376 of the Revised Statutes of Quebec, 1909, amended by 4 Geo. 5, c. 9.

Art. 1375 imposes a duty upon property and art. 1376 is as follows: "The word 'property' within the meaning of this section includes all property, moveable or immoveable, actually situate within the Province, and all debts which were owing to the deceased at the time of his death, or are payable by reason of his death, and which are either payable in the Province, or are due by a debtor domiciled therein; the whole whether the deceased at the time of his death had his domicile within or without the Province, or whether the transmission takes place within or without the Province."

As the deceased was not domiciled in Quebec the claim necessarily depends on the plaintiff showing that the deceased's shares were property actually situated within the Province.

The Royal Bank is a corporation incorporated and carrying on business by virtue of the Dominion Bank Act. Its head office is in Montreal, but by s. 43, sub-s. 4, it is provided: "The Bank may open and maintain in any Province in Canada in which it has resident shareholders and in which it has one or more branches or agencies, a share registry office, to be designated by the directors, at which the shares of the shareholders, resident within the Province, shall be registered and at which, and not elsewhere, except as hereinafter provided, such shares may be validly transferred."

The Royal Bank did open such an office in Halifax, and the deceased's shares were registered there and the certificate therefor was held by the deceased in Halifax. The respondents, having applied for probate in Nova Scotia, made up title to the shares, but, on the intervention of the present appellant, conveyed a certain number of the shares in trust to meet the present claim. The action as originally started demanded also payment in respect of shares in other companies which had their offices and registers in Quebec. As to these companies, the present respondents, not having the advantage of the specialty in connection with the local register in Nova Scotia, could only rely on

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the argument that shares had no local habitation, that accordingly the doctrine *mobilia sequuntur personam* must apply, and that the domicile of the deceased being in Nova Scotia the action must fail.

The case came before de Lorimier J. in the Supreme Court of Montreal. He decided that shares could have a local habitation and that that local habitation was the head office of the company. He accordingly decreed in favour of the plaintiff as to both sets of shares. That judgment was appealed to the appeal side of the Court of King's Bench. That Court affirmed the judgment, the judges being unanimous that shares could have a local habitation, which, therefore, concluded the matter in respect of the shares other than those of the Royal Bank, but as to the Royal Bank shares, held by a majority of three to two that the local habitation was in Quebec, the dissentient judges holding that it was in Nova Scotia.

Appeal was taken to the Supreme Court of Canada. In the meantime, while this litigation was going on another action had been raised by the Nova Scotia tax authorities against the same executors for succession duties on the same shares in the Royal Bank. This action had found its way to the Supreme Court of Canada, which had decided that the Royal Bank shares were liable in Nova Scotia, either as having a local situation in Nova Scotia or as being attached to the domicile of the testator, which was in Nova Scotia. Accordingly, when the appeal in this case came to the Supreme Court they held themselves bound by their former judgment, and allowed the appeal, so far as relating to the Royal Bank shares. Appeal has now been taken to the King in Council.

The judgment, so far as dealing with the shares other than those of the Royal Bank, is acquiesced in, as there is no cross-appeal. In these circumstances their Lordships think it best to deal exclusively with the question of the local situation of the shares, assuming that shares have a local situation. If they cannot, the appellant cannot succeed, because the deceased was not domiciled in Quebec. Upon the assumption that they can, their Lordships think that the judgment of the Supreme Court was right.

The argument for the appellant was put in two ways. Admitting that, for the purposes of transference, the shares

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can now only be dealt with in Nova Scotia, they said that there were many things in connection with shares other than transference which could only be done in Quebec, as for instance the declaration of a dividend, the claim put forward in the event of liquidation, the voting at a general meeting, etc. The argument seems to their Lordships clearly double-edged; for if there are, so to speak, so many qualities of a share which are attributable to different places it would seem to follow that there cannot be a proper local habitation for a share at all—an argument which is necessarily excluded from the appellant, because it would be fatal to him in another aspect.

The appellant then argued that the words of s. 4 of the Dominion Bank Act are “at which, and not elsewhere, such shares may be validly transferred,” and that the word “transferred” applied to transfer inter vivos and must be distinguished from transmission, which is a proper term for what happens on death. Their Lordships do not think that this distinction can avail.

Sect. 51 deals with transmission by decease: “Notwithstanding anything in this Act, if the transmission of any share of the capital stock has taken place by virtue of the decease of any shareholder . . . (c) if the deceased shareholder died out of His Majesty’s dominions, any authenticated copy of the probate of his will or letters of administration of his property, or other document of like import, granted by any Court or authority having the requisite power in such matters; shall be sufficient justification and authority to the directors for paying any dividend, or for transferring or authorizing the transfer of any share in pursuance of and in conformity to the probate, letters of administration, or other such document as aforesaid.”

It is clear from this that “transmission” is used to express the legal result which follows on death, but not to express the actual step which is necessary to invest the new holder. That is done by transfer, and that transfer in such a case is effectuated by a change in the register where the shares are registered, that is in this case in Nova Scotia. Their Lordships consider that the question was really settled by *Attorney-General v. Higgins*. (1) Baron Martin in that case says in so many words: “It is clear that the evidence of title

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to these shares is the register of shareholders and, that being in Scotland, this property is located in Scotland."

It is quite true that in that case the head office as well as the register was in Scotland, but in their Lordships' view it is impossible to hold that in that case the position of the head office was the dominant factor merely on the strength of a phrase used by the reporter of the Attorney-General's argument, and a casual reference made to the case by Lord Esher in a subsequent case of *Attorney-General v. Lord Sudeley*. (1) In the present case Duff J., dealing no doubt with the "no local situation" argument, said as follows: "And the Chief Baron's judgment, I think, points to the essential element in determining situs in the case of intangible chattels for the purpose of probate jurisdiction as "the circumstance that the subjects in question could be effectively dealt with within the jurisdiction." This is, in their Lordships' opinion, the true test. Where could the shares be effectively dealt with? The answer in the case of these shares is in Nova Scotia only, and that answer solves the question.

It may be well to remark that, although in the way the case has developed itself, it has been found unnecessary to decide whether shares can have a local situation, their Lordships must not be considered as throwing any doubt on the soundness of the conclusion to which the Supreme Court has come in that matter.

1925 A.C. p. 377. Their Lordships think it also necessary to add that no question was argued before them as to whether the legislation, in so far as it sought to place a tax on this particular estate, was ultra vires of the Province. They do not suggest that questions could have been raised such as were raised in the case of *Burland v. The King* (2), lately before the Board. They only wish to make it clear that the judgment in this case has no corollary attached to it dealing with such matters.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors for appellant: *Blake & Redden*.

Solicitors for respondents: *Burchells*.

(1) [1896] 1 Q.B. 354.

(2) [1922] 1 A.C. 215.

[PRIVY COUNCIL.]

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NADAN..... APPELLANT;

AND

THE KING..... RESPONDENT.

ATTORNEY-GENERAL FOR ENG-
 LAND AND ATTORNEY-GENERAL } INTERVENERS.
 FOR CANADA..... }

ON APPEAL FROM THE SUPREME COURT OF ALBERTA,
 APPELLATE DIVISION.

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Canada—Legislative Power—Appeal to Privy Council—Royal Prerogative to grant Leave—"Criminal Case"—Colonial Law Validity Act, 1865 (28 & 29 Vict. c. 63), s. 2—British North America Act, 1867 (30 & 31 Vict. c. 3), s. 91—Criminal Code (R.S. Can., 1906, c. 146), s. 1025.

Sect. 1025 of the Criminal Code of Canada, if and so far as it is intended to prevent the King in Council from giving effective leave to appeal against an order of a Canadian Court in a criminal case, is invalid. The legislative authority of the Parliament of Canada as to criminal law and procedure, under s. 91 of the British North America Act, 1867, is confined to action to be taken in Canada. Further, an enactment annulling the royal prerogative to grant special leave to appeal would be inconsistent with the Judicial Committee Acts, 1833 and 1844, and therefore would be invalid under s. 2 of the Colonial Laws Validity Act, 1865. The royal assent to the Criminal Code could not give validity to an enactment which was void by Imperial statute; exclusion of the prerogative could be accomplished only by an Imperial statute.

According, however, to the well settled practice of the Judicial Committee His Majesty is advised to intervene in a criminal case only if it is shown that, by a disregard of the power of legal process, or by some violation of natural justice, or otherwise, substantial and grave injustice has been done.

The appellant was convicted in Alberta of an offence under the Government Liquor Control Act of Alberta (14 Geo. 5, c. 14), which did not incorporate s. 1025 of the Criminal Code of Canada, and of an offence under the Canada Temperance Act (R.S. Can., 1906, c. 152). For each offence he was sentenced to a fine, and in default imprisonment. The Supreme Court of Alberta, rejecting contentions as to the construction and invalidity of the material sections, affirmed the convictions, but gave leave to appeal to the Privy Council. The Crown petitioned the Judicial Committee to quash the appeals as incompetent, having regard to s. 1025. The appellant petitioned for special leave to appeal. The petitions were heard with the appeals:—

Held (1.) that each appeal was in a "criminal case" to which s. 1025 applied, so far as it was valid; (2.) that (in the absence of argument to the contrary) s. 1025 prevented the Appellate Division from giving effective leave to appeal; (3.) that s. 1025 did not exclude the prerogative right to give leave to appeal, but that the cases were clearly not within the category of the exceptional cases in which special leave to appeal was advised in a criminal matter.

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**Present:* VISCOUNT CAVE L.C., VISCOUNT DUNEDIN, LORD SHAW, LORD PHILLIMORE, and LORD BLANESBURGH.

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CONSOLIDATED APPEAL (No. 24 of 1925) from a judgment of the Appellate Division of the Supreme Court of Alberta (January 7, 1925) affirming two convictions by a police magistrate in Alberta; also, heard with the appeals, petition to dismiss the appeals as incompetent, and petition for special leave to appeal.

The convictions affirmed were: (1.) Under the Government Liquor Control Act, Statutes of Alberta, 1924, c. 14, of having intoxicating liquor within the Province without having the package officially sealed; (2.) Under the Canada Temperance Act, R.S. Can., 1906, c. 152, as amended by 10 Geo. 5, c. 8, of transporting through the Province intoxicating liquor otherwise than by means of a common carrier by water or by rail. In respect of each offence the appellant was sentenced to a fine, or in default to imprisonment.

The Appellate Division (Harvey C.J., Stuart J.A. and Clark J.A.; Beck J.A. and Hyndman J.A. dissenting) affirmed the convictions, subject to an amendment of the second conviction, and gave leave to appeal to His Majesty in Council. The two proceedings in the Appellate Division are reported at 21 Alb. L.R. 193, 231.

The respondent petitioned that the appeals should be quashed or dismissed on the ground that they were not competent having regard to s. 1025 of the Criminal Code of Canada, and on the ground that the leave given was not competent having regard to the Alberta Order in Council, 1910.

The appellant petitioned for special leave to appeal.

It was ordered that the hearing of both petitions should stand over until the hearing of the consolidated appeal.

His Majesty's Attorney-General and the Attorney-General for Canada were given leave to intervene.

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1925. Dec. 10, 11, 14. The consolidated appeal having been partially opened on the merits, their Lordships desired to hear the questions arising on the petitions argued.

R. B. Bennett K.C. and *Pritt* for the respondent. The Appellate Court had no jurisdiction to give leave to appeal to the Privy Council having regard to s. 1025 of the Criminal Code of Canada. That section was *intra vires* under the

British North America Act, 1867, s. 91, the general words and head 27 as to criminal law. The power conferred was complete: *Attorney-General for Ontario v. Attorney-General for Canada* (1); it included power to limit the royal prerogative in that respect. The cases were "criminal cases" within the meaning of s. 1025, even though they depended upon questions of ultra vires and of construction. Nor was it material that the first conviction was under a Provincial statute imposing penalties under the power contained in s. 92, head 15: *Rex v. Nat Bell Liquors*. (2) [Reference was made also to *Toronto Street Ry. Co. v. The King* (3); *Attorney-General for Ontario v. Hamilton Street Ry. Co.* (4); Interpretation Act (R.S. Can., 1906, c. 1), s. 28.]

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Clauson K.C. (*T. Mathew* with him) for the Attorney-General for Canada, intervener. Sect. 1025 excludes the appeals and the right to grant special leave. The King and His Parliament of Canada have complete legislative power in the matters in respect of which legislative authority is given by the British North America Act: *Bank of Toronto v. Lambe* (5); *Attorney-General for Ontario v. Attorney-General for Canada* (6); *In re the Initiative and Referendum Act*. (7) It was therefore competent to enact that in no circumstances should a person who had been convicted of a criminal offence ask for an exercise of the prerogative right. The British North America Act, 1867, does not, as it might have done, expressly exclude the legislative power to deal with the royal prerogative. The section is not invalid under the Colonial Laws Validity Act, 1865, as conflicting with the Judicial Committee Acts, because those Acts are merely enabling Acts, and are not the source of the prerogative. The Alberta Order in Council, 1910, giving a right of appeal with the leave of the Court in Alberta, does not apply to criminal cases; if it does, the same argument applies. Further, the Colonial Laws Validity Act, 1865, ceased to operate in the matter when the British North America Act, 1867, was passed. Even if s. 1025 is ultra vires so far as it purports to deal with the prerogative right, the Judicial Committee would hesitate to advise special

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(1) [1912] A.C. 571.

(2) [1922] 2 A.C. 128, 167.

(3) [1917] A.C. 630, 637.

(4) [1903] A.C. 524, 528.

(5) [1887] 12 App. Cas. 575, 588.

(6) [1912] A.C. 571, 581.

(7) [1919] A.C. 935, 942.

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leave being given in a class of cases as to which the Dominion Parliament has deliberately expressed the view that there should be no appeal.

Sir Douglas Hogg A.-G. (Given with him), intervener. Sect. 1025 is not effective to deprive His Majesty of the prerogative right to grant special leave to appeal. That right can be taken away only by an Imperial Act, or by a charter or statute having the authority of an Imperial statute: *Reg. v. Bertrand*. (1) Precise words must be used: *Théberge v. Laudry* (2); *Cushing v. Dupuy* (3); it is, at any rate, very unlikely that, if the Imperial Legislature intended to limit the royal prerogative, it would not have used precise words. The British North America Act, 1867, therefore does not confer the power. There is no direct authority, but the following support the contention: Opinion of Lord Brougham cited in *Cuvillier v. Aylwin* (4), which case was overruled in *Cushing v. Dupuy* (5); *Reg. v. Edulji Bryamjee* (6); *Reg. v. Alloo Paroo* (7); *Townsend v. Cox* (8); *Attorney-General for Canada v. Attorney-General for Ontario* (9); *Webb v. Outrim* (10); Keith's Representative Government in the British Dominions, 1912 ed., vol. ii., pp. 980, 981; Wheeler's Confederation Law of Canada, 1896, p. 34; Quick and Gorran's Constitution of the Australian Commonwealth, 2nd ed., pp. 60 to 62. When the Imperial Parliament intended to give authority to limit the royal prerogative, as in the case of the Australian Commonwealth and South Africa, it has done so expressly. There have been appeals to the Privy Council where s. 1025 might have been relied on, but was not: *Wentworth v. Mathieu* (11); *Rex v. Nat Bell Liquors* (12). In other cases the question has arisen, but no decision was necessary: *Toronto Ry. Co. v. The King* (13); *Attorney-General for Ontario v. Reciprocal Insurers* (14); *Attorney-General for Ontario v. Daly*. (15) Further, so far as s. 1025 purports to take away the prerogative right to grant special leave it conflicts with the Judicial Committee Acts, 1833 and 1844,

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(1) (1867) L.R. 1 P.C. 520, 530.

(2) (1876) 2 App. Cas. 102, 106.

(3) (1880) 5 App. Cas. 409, 416.

(4) (1832) Stuart's L.C. Rep. 527; also (without the Opinion) 2 Knapp 72.

(5) 5 App. Cas. 409, 417.

(6) (1846) 5 Moo. P.C. 276.

(7) (1847) 5 Moo. P.C. 296.

(8) [1907] A.C. 514.

(9) [1897] A.C. 199.

(10) [1907] A.C. 81.

(11) [1900] A.C. 212.

(12) [1922] 2 A.C. 128.

(13) [1917] A.C. 630.

(14) [1924] A.C. 328, 348.

(15) [1924] A.C. 1011, 1015.

and is therefore invalid under the Colonial Laws Validity Act, 1865. Sect. 1025 is effective, however, to preclude any Court in Canada from granting leave to appeal: *Cushing v. Dupuy*. (1) The view that if s. 1025 is ineffective to take away the prerogative yet weight should be given to it upon an application for leave to appeal, is supported by *Reg. v. Ames*. (2)

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Frank Ford K.C. and *Hon. Geoffrey Lawrence K.C.* for the appellant. The appellant adopts the argument of the Attorney-General as to the incompetence of s. 1025 to take away the right to grant special leave. Further, if the Dominion Parliament has that power, so also have the Provincial Legislatures as to penalties imposed under the British North America Act, 1867, s. 92, heads 13 and 14; for the power of a Provincial Legislature, within its sphere, is as plenary as that of the Parliament of Canada: *Hodge v. The Queen*. (3) By s. 101 the Parliament of Canada was given power to set up a Court of Appeal for Canada, but no mention was made of authority to take away or limit the prerogative.

In s. 1025 "criminal case" is used in the sense in which it is used in s. 91, head 27, of the British North America Act, 1867; the words do not include the case under the Government Liquor Control Act, which did not adopt s. 1025. On this point *Rex v. Nat Bell Liquors* (4) is distinguishable, as there the Dominion Legislature was dealing with the Supreme Court, its own creation. It would be ultra vires for the Dominion to limit the right of appeal in cases arising out of a Provincial Act imposing penalties: *Attorney-General for Ontario v. Reciprocal Insurers* (5). Nor is the case under the Canada Temperance Act a "criminal case"; that Act was not passed under the power as to criminal law, but under the general power to legislation for peace, order, and good government: *Toronto Electric Commissioners v. Snider*. (6) Even if the cases are criminal cases the Appellate Court had power under the Alberta Order in Council, 1910, to grant leave.

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If special leave is necessary it should be granted, as the cases involve important questions of construction of statutes and of legislative competence.

(1) 5 App. Cas. 409.

(2) (1841) 3 Moo. P.C. 409, 413.

(3) (1883) 9 App. Cas. 117, 132.

(4) [1922] 2 A.C. 128, 167.

(5) [1924] A.C. 323, 339.

(6) [1925] A.C. 396, 406, 407.

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R. B. Bennett K.C. replied.

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VISCOUNT CAVE L.C. These are appeals from two judgments of the Appellate Division of the Supreme Court of Alberta dismissing appeals against convictions by a police magistrate; and, in the course of the argument, important questions have been raised as to the royal prerogative and as to the jurisdiction of this Board.

On the night of September 29-30, 1924, the appellant, who was in the employment of a firm of carriers in Fernie, in the Province of British Columbia, was driving a motor car containing a consignment of intoxicating liquor from Fernie through the Province of Alberta to Sweet Grass, Montana, in the United States of America. Whilst in the neighbourhood of Coleman, in the Province of Alberta, in the course of this journey he was arrested by the Alberta Provincial police; and, on the following morning, September 30, 1924, he was charged before a police magistrate at Blairmore, Alberta, (a) with having liquor within the Province of Alberta without the package containing the same being or having been sealed with the official seal prescribed by the Government Liquor Control Board of Alberta, contrary to the Government Liquor Control Act of Alberta (ch. 14 of the Statutes of Alberta, 1924), and (b) with carrying or transporting through the Province of Alberta intoxicating liquor otherwise than by means of a common carrier by water or by railway, contrary to the provisions of the Canada Temperance Act (R.S. Can., c. 152), as amended by 10 Geo. 5, c. 8. These charges were duly heard before the police magistrate, who, on October 14, 1924, convicted the appellant on both charges. On the first charge he sentenced the appellant to a fine of \$200 and \$7.50 costs, or in default thirty days' imprisonment with hard labour, and declared the motor car forfeited to His Majesty in the right of the Province of Alberta, the liquor being ipso facto forfeited. On the second charge he sentenced the appellant to a fine of \$500 and \$2 costs, or, in default, three months' imprisonment with hard labour.

The appellant carried both these decisions to the Appellate Division of the Supreme Court of Alberta, the first by an appeal by way of stated case and the second by motion

by way of certiorari to quash the conviction; but that Court (by a majority) dismissed both appeals, the conviction on the second charge being amended in minor respects. By order dated February 19, 1925, the Appellate Division of the Supreme Court of Alberta granted to the appellant leave to appeal to His Majesty in Council from the judgments of that Division and to consolidate the appeals.

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On May 5, 1925, the respondent presented a petition to His Majesty in Council, asking that the appeals might be quashed or dismissed as incompetent, mainly on the ground that the appeals were brought in criminal cases, and that, by virtue of s. 1025 of the Criminal Code of Canada, no Court in Canada had jurisdiction to grant leave to appeal to the King in Council in criminal cases. Some technical objections were also taken to the appeal. Upon this petition coming on for hearing, the questions raised were adjourned to be dealt with on the hearing of the appeals; and a petition for special leave to appeal, which had been lodged by the appellant, was adjourned in like manner.

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Leave was given to His Majesty's Attorney-General and to the Attorney-General for Canada to intervene, and they have intervened accordingly and have taken part in the argument.

It is convenient before considering the merits of the appeals to deal with the questions which have been raised as to the validity and effect of s. 1025 of the Criminal Code, which runs as follows: "1025. Notwithstanding any royal prerogative, or anything contained in the Interpretation Act or in the Supreme Court Act, no appeal shall be brought in any criminal case from any judgment or order of any Court in Canada to any court of appeal or authority by which in the United Kingdom appeals or petitions to His Majesty in Council may be heard." It was argued on behalf of the appellant that neither of these appeals was brought in a "criminal case" within the meaning of the above section; but, in their Lordships' opinion, this argument cannot prevail. In each of the cases the appellant was charged with an offence against the public law, and a sentence of imprisonment could be, and was, imposed. An attempt was made to distinguish the appeal against the conviction under the Government Liquor Control Act of Alberta from the appeal against the conviction under the Canada Temperance Act on the ground that the penalties

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under the former statute are imposed by a Provincial statute which does not incorporate s. 1025 of the Criminal Code; but this contention appears to their Lordships to be negated by the judgment of the Board in *Rex v. Nat Bell Liquors*. (1) Sect. 1025 is expressed to apply to an appeal in a criminal case from "any judgment or order of any Court in Canada," and this expression is wide enough to cover a conviction in any Canadian Court for breach of a statute, whether passed by the Legislature of the Dominion or by the Legislature of the Province.

Their Lordships proceed, therefore, to consider the effect of s. 1025 on the assumption that it applies to these appeals. Having regard to the course taken by the argument, it appears that one question only falls to be decided in this case—namely, whether that section prevents the King in Council from granting special leave to appeal. The Attorney-General, who argued the case for the Crown, did not contest the view that, having regard to the provisions of s. 1025, it was not open to the Supreme Court of Alberta to give leave to appeal in this case—presumably on the ground that the Dominion Parliament, having exclusive legislative authority in respect of the procedure in criminal matters throughout Canada, had power to deprive the Canadian Court of any jurisdiction to grant leave to appeal in those matters. In these circumstances their Lordships will assume, for the purposes of this case, that the leave to appeal granted by the Supreme Court was ineffective, and they will confine their decision to the question whether the Board can and should advise the granting of special leave to appeal.

It was suggested by the Attorney-General that, as the section provides only that "no appeal shall be brought" in a criminal case, it may be construed as applying only to appeals originating in the Dominion and not to appeals for which special leave may be granted by His Majesty on the advice of this Board. But having regard to the reference in the section to the royal prerogative, their Lordships have difficulty in putting upon it the limited construction which is suggested; and they think it right to deal with the matter upon the footing that the section was intended to apply even to appeals brought by special leave

(1) [1922] 2 A.C. 128, 167.

granted under the prerogative, and to consider whether the section, so far as it applies to such appeals, is or is not valid. This broad question might apparently have been raised in *Wentworth v. Mathieu* (1); *Townsend v. Cox* (2); and *Rex v. Nat Bell Liquors* (3); but for some reason it was not in fact raised in those cases. In *Toronto Ry. Co. v. The King* (4) and *Attorney-General for Ontario v. Daly* (5) the point was raised; but as the appeals failed on other grounds it became unnecessary to decide it. It is very desirable that a decision upon the question should now be reached.

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The practice of invoking the exercise of the royal prerogative by way of appeal from any Court in His Majesty's Dominions has long obtained throughout the British Empire. In its origin such an application may have been no more than a petitory appeal to the Sovereign as the fountain of justice for protection against an unjust administration of the law; but if so, the practice has long since ripened into a privilege belonging to every subject of the King. In the United Kingdom the appeal was made to the King in Parliament, and was the foundation of the appellate jurisdiction of the House of Lords; but in His Majesty's Dominions beyond the seas the method of appeal to the King in Council has prevailed and is open to all the King's subjects in those Dominions. The right extends (apart from legislation) to judgments in criminal as well as in civil cases: see *Reg. v. Bertrand*. (6) It has been recognized and regulated in a series of statutes, of which it is sufficient to mention two—namely, the Judicial Committee Act, 1833 (3 & 4 Will. 4, c. 41), and the Judicial Committee Act, 1844 (7 & 8 Vict. c. 69). The Act of 1833 recites that "from the decisions of various courts of judicature in the East Indies and in the Plantations, Colonies and other Dominions of His Majesty abroad, an appeal lies to His Majesty in Council," and proceeds to regulate the manner of such appeal; and the Act of 1844, after reciting that "the Judicial Committee, acting under the authority of the said Acts [the Act of 1833 and an amending Act] hath been found to answer well the purposes for which it was so established by Parliament, but it is found necessary to

(1) [1900] A.C. 212.
(2) [1907] A.C. 514.
(3) [1922] 2 A.C. 128.

(4) [1917] A.C. 630.
(5) [1924] A.C. 1011.
(6) L.R. 1 P.C. 520.

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improve its proceedings in some respects for the better despatch of business and expedient also to extend its jurisdiction and powers," enacts (in s. 1) that it shall be competent to Her Majesty by general or special Order in Council to "provide for the admission of any appeal or appeals to Her Majesty in Council from any judgments, sentences, decrees or orders of any Court of justice within any British Colony or Possession abroad." These Acts, and other later statutes by which the constitution of the Judicial Committee has from time to time been amended, give legislative sanction to the jurisdiction which had previously existed.

Under what authority, then, can a right so established and confirmed be abrogated by the Parliament of Canada? The British North America Act, by s. 91, empowered the Dominion Parliament to make laws for the peace, order and good government of Canada in relation to matters not coming within the classes of subjects by that Act assigned exclusively to the Legislatures of the Provinces; and in particular it gave to the Canadian Parliament exclusive legislative authority in respect of "the criminal law, except the constitution of Courts of criminal jurisdiction, but including the procedure in criminal matters." But however widely these powers are construed they are confined to action to be taken in the Dominion; and they do not appear to their Lordships to authorize the Dominion Parliament to annul the prerogative right of the King in Council to grant special leave to appeal. Further, by s. 2 of the Colonial Laws Validity Act, 1865, it is enacted that "any colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the Colony to which such law may relate, or repugnant to any order or regulation made under the authority of such Act of Parliament or having in the Colony the force and effect of such Act, shall be read subject to such Act, order or regulation, and shall to the extent of such repugnancy but not otherwise, be and remain absolutely void and inoperative." In their Lordships' opinion s. 1025 of the Canadian Criminal Code, if and so far as it is intended to prevent the Sovereign in Council from giving effective leave to appeal against an order of a Canadian Court, is repugnant to the Acts of 1833 and 1844 which have been cited, and is therefore void and inoperative by virtue of

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the Act of 1865. It is true that the Code has received the royal assent, but that assent cannot give validity to an enactment which is void by Imperial statute. If the prerogative is to be excluded, this must be accomplished by an Imperial statute; and in fact the modifications which were deemed necessary in respect of Australia and South Africa were effected in that way: see Commonwealth of Australia Act, 1900, s. 74, and Union of South Africa Act, 1909, s. 106.

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Before parting with this question, it is desirable to consider certain previous decisions of the Board upon which arguments have been based. In *Cuvillier v. Aylwin* (1) the Legislature of Lower Canada having passed an Act limiting the right of appeal to His Majesty in Council, the Board gave effect to that Act by refusing to hear an appeal which was in contravention of it; but, as has been pointed out in later cases, the Act of the Legislature of Lower Canada there in question was expressly authorized by the British Act of Parliament commonly called the Canada Act (31 Geo. 3, c. 31), which empowered the Legislature of Lower Canada to limit and define the right of appeal: see 5 Moo. P.C. 294, 304; 15 Moo. P.C. 193; and 5 App. Cas. 417. In *Reg. v. Ames* (2) a Jersey ordinance having declared that no appeal was admissible in criminal cases, Baron Parke, speaking for this Board, declined to admit that the Board had not power to advise His Majesty to allow an appeal. In *Reg. v. Eduljee Byramjee* (3) effect was given to a provision in the Bombay Charter of 1823 authorizing the Supreme Court of Judicature of Bombay to deny an appeal to any party aggrieved by a decision of that Court; but it was pointed out that the charter was granted under the express authority of an Act of the British Parliament (4 Geo. 4, c. 71) and that its provisions were valid on that ground. The same observation applies to the case of *Reg. v. Alloo Paroo* (4), where the point was further discussed in the judgment of Lord Brougham. In *Théberge v. Laudry* (5), where the Legislature of Quebec, in creating a special tribunal for the trial of election petitions, had declared that the judgments of that tribunal should not be susceptible of appeal, it was held that this provision pre-

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(1) 2 Knapp 72.

(2) 3 Moo. P.C. 409.

(3) 5 Moo. P.C. 276.

(4) 5 Moo. P.C. 296.

(5) 2 App. Cas. 102.

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vented an appeal to His Majesty in Council; but Lord Cairns, in declaring the decision of the Board to that effect, rested the decision upon the peculiar character of the enactment, and held that it was the intention of the Quebec Legislature, when creating a special tribunal, not to create it with the ordinary incident of an appeal to the Crown. In *Cushing v. Dupuy* (1) the Board, while holding that the Dominion Parliament in creating a tribunal for dealing with the subjects of bankruptcy and insolvency had power to declare the decisions of that tribunal to be final, held also that the enactment did not derogate from the prerogative of the Sovereign to allow such appeal as an act of grace. Sir Montagu Smith, in declaring the decision of the Board, reviewed *Cuwillier v. Aylwin* (2) and other cases. In *Wi Matua's Will* (3) it was held by this Board that the royal prerogative could not be excluded, even by Imperial statute, except by express words. In *Webb v. Outrim* (4), where it was argued that the Commonwealth Judiciary Act of Australia had indirectly prevented an appeal to His Majesty in Council, this Board held that the Commonwealth Parliament had no authority to pass an enactment having that effect; and Lord Halsbury in his judgment, given on behalf of the Board, expressed agreement with the statement of Hodges J. in the Supreme Court of Victoria that "in such an important matter direct authority would be given or none at all," and with the following passage from the judgment of the same learned judge: "If the Federal Legislature had passed an Act which said that hereafter there shall be no right of appeal to the King in Council from a decision of the Supreme Court of Victoria in any of the following matters, and had then set out a number of matters, including that now under consideration, I should have felt no doubt that such an Act was outside the power of that Federal Legislature. And, in my opinion, it is outside their power to do that very thing in a round-about way."

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In the case of *In re Initiative and Referendum Act* (5), Lord Haldane, in declaring the judgment of the Board, referred to "the impropriety in the absence of clear and unmistakable language of construing s. 92 as permitting

(1) 5 App. Cas. 409.

(2) 2 Knapp, 72.

(3) [1903] A.C. 448.

(4) [1907] A.C. 81.

(5) [1919] A.C. 935, 943.

the abrogation of any power which the Crown possesses through a person directly representing it''; an observation which applies with equal force to s. 91 of the Act of 1867 and to the abrogation of a power which remains vested in the Crown itself. Upon a review of these authorities, it appears to their Lordships that they contain nothing inconsistent with the conclusion which their Lordships have reached upon principle, and that, so far as they go, they support that conclusion.

It remains to consider whether in the case of the two judgments now under consideration His Majesty should be advised to grant special leave to appeal. Their Lordships have no hesitation in answering this question in the negative. It has for many years past been the settled practice of the Board to refuse to act as a Court of criminal appeal, and to advise His Majesty to intervene in a criminal case only if and when it is shown that, by a disregard of the forms of legal process or by some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done. This practice and the reasons for it were clearly explained in the above-cited case of *Reg. v. Eduljee Byramjee* (1), where Dr. Lushington pointed out the extreme inconvenience which would arise from permitting a long series of appeals from decisions in criminal cases. This view has been repeated and enforced in a number of later cases, such as *Falkland Islands Co. v. The Queen* (2); *Reg. v. Dillet* (3); *Arnold v. The King-Emperor* (4); *Ibrahim v. The King* (5); and *Dal Singh v. The King-Emperor*. (6) Their Lordships have not left out of mind the consideration that the learned judges in the Supreme Court of Alberta deemed these cases to be the proper subjects of appeal. But notwithstanding this, their Lordships must be guided by the established principle which applies with full force to the present application.

The present appeals are clearly not within the category of exceptional cases in which leave to appeal would be advised by this Board. The appellant has been convicted (a) of having liquor within the Province of Alberta without the package containing it being sealed with the official seal,

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(1) 5 Moo. P.C. 276, 289.

(2) (1863) 1 Moo. P.C. (N.S.)
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(3) (1887) 12 App. Cas. 459.

(4) (1914) L.R. 41 I.A. 149.

(5) [1914] A.C. 599.

(6) (1917) L.R. 44 I.A. 157.

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and (b) of transporting through the Province of Alberta intoxicating liquor otherwise than by means of a common carrier by water or by rail. The former conviction is questioned on grounds relating to the construction and validity of certain sections of the Government Liquor Control Act of Alberta and the Liquor Act of that Province, and the second conviction is questioned for similar reasons connected with the Canada Temperance Act. The arguments of the appellant on these points, which in the case of the former conviction were twenty-two and in the case of the latter fourteen in number, were fully heard by the Appellate Division of the Supreme Court of Alberta and were dealt with by the learned judges of that Division in reasoned judgments; and there can be no possible question of a disregard of the forms of legal process or the violation of any principle of natural justice. It is of the utmost importance that a decision on a criminal charge so reached should take immediate effect without a long drawn out process of appeal, and it is undesirable that appeals upon such decisions should be encouraged by the Board.

For these reasons their Lordships will humbly advise His Majesty that these appeals and the two petitions should be dismissed, but (in the circumstances) without costs.

Solicitors for appellant: *Lawrence Jones & Co.*

Solicitors for respondent: *Blake & Redden.*

Solicitors for interveners: *Treasury Solicitor and Charles Russell & Co.*

[PRIVY COUNCIL.]

ATTORNEY-GENERAL FOR QUEBEC... APPELLANT;

AND

| | | |
|---|---|--------------|
| NIPISSING CENTRAL RAILWAY COMPANY AND ATTORNEY- GENERAL FOR CANADA..... | } | RESPONDENTS. |
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ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Legislative Power—Dominion Railway—Expropriation of Provincial Crown Lands—Railway Act, 1919 (9 & 10 Geo. 5, c. 68), s. 189—British North America Act, 1867 (30 & 31 Vict. c. 3), ss. 91, 92.

Sect. 189 of the Railway Act, 1919, of Canada, which empowers any railway company, with the consent of the Governor-General, to take Crown lands for the use of the railway, applies to Provincial Crown lands as well as to Dominion Crown lands.

The enactment was within the legislative powers of the Parliament of Canada under s. 91, head 29, and s. 92, head 10, of the British North America Act, 1867.

Although sub-s. 4 of s. 189 contemplates that the compensation for Crown lands taken will be paid to the Governor in Council, there is no reason why he should not direct that any compensation received in respect of Crown lands of a Province should be handed over to the Government of that Province.

Judgment of the Supreme Court of Canada [1926] S.C.R. 163 affirmed.

APPEAL (No. 15 of 1926) by special leave from a judgment of the Supreme Court of Canada dated December 10, 1925.

The Railway Act, 1919, of Canada, makes provision for the expropriation of lands for the purpose of railways, and for the payment of compensation for lands taken. By s. 189 a railway company, with the consent of the Governor-General in Council, may take Crown lands for the use of the railway.

The Governor-General referred to the Supreme Court questions as to the effect of the section, and its competence in relation to Provincial Crown lands.

The circumstances in which the reference was made, the terms of the questions, and of the section appear from the judgment of the Judicial Committee.

The Supreme Court in a judgment delivered by Newcombe J. and concurred in by Anglin C.J. and Duff,

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*Present: VISCOUNT CAVE L.C., VISCOUNT HALDANE, LORD ATKINSON, LORD SHAW, and LORD PARMOOR.

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Mignault and Rinfret JJ., held that the section, on its true construction, applied to Provincial Crown lands, and that it was competent under ss. 91 and 92 of the British North America Act, 1867. The judgment is reported at [1926] S.C.R. 163.

1926. April 19, 20, 22. *Sir John Simon K.C., Lanctot K.C. (Attorney-General for Quebec), M. Alexander, and Frank Gahan* for the appellant. Sect. 189 of the Railway Act, 1919, is ultra vires unless it applies only to Dominion Crown lands. By s. 117 of the British North America Act, 1867, the Provinces were to retain their respective public property not otherwise disposed of by that Act, and the Dominion was given a right to take them only if they were required for fortification or the defence of the country. The decision of the Supreme Court was based entirely upon *Attorney-General for British Columbia v. Canadian Pacific Ry. Co.* (1) That decision is distinguishable on the following grounds. (a) The lands there in question were found to be part of a public harbour, and therefore Dominion property; though the right to appropriate Provincial Crown lands was mooted, it was not the subject-matter of the decision. (b) It was a term of the admission of British Columbia to the Union that that Province should provide lands for the purpose of the railway; the Order in Council approving the terms had, under s. 146 of the British North America Act, the force of an Imperial statute. (c) The trial judge (Duff J.) found that the Province had assented to the occupation of the lands by the railway company. (d) Neither of the cases cited in the judgment in that appeal—*Canadian Pacific Ry. Co. v. Notre Dame de Bonsecours* (2); *Toronto Corporation v. Bell Telephone Co.* (3)—Dealt with the effect of Dominion legislation on Provincial Crown lands.

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p. 717. There is an essential distinction between the proprietary rights of a Province in Provincial Crown lands, and the power of the Dominion to legislate as to Dominion railways; that power cannot be exercised so as to deprive a Province of lands vested in it at confederation: *Attorney-General for Canada v. Attorney-General for Ontario* (the first *Fisheries* case) (4); *Ontario Mining Co. v. Seybold* (5); *St. Catherines*

(1) [1906] A.C. 204.

(2) [1899] A.C. 367.

(3) [1905] A.C. 52.

(4) [1898] A.C. 700, 713.

(5) [1903] A.C. 73, 79.

Millington and Lumber Co. v. The Queen (1); *Attorney-General for Canada v. Attorney-General for Quebec* (2); *Montreal City v. Montreal Harbour Commissioners*. (3) Sect. 189, now in question, is substantially a reproduction of the Consolidated Statutes of Canada, 1859, c. 66, s. 133, and should be construed as applying to Dominion Crown lands, not to lands expressly conferred on the Province at confederation. Sub-s. 4 of s. 189 is inconsistent with the view that the section authorizes the taking of Provincial lands. There has never been an instance of Provincial Crown lands being taken by the Dominion for railway purposes without the consent of the Provincial authorities. [Reference was made also to the British North America Act, 1867, ss. 12, 65, 91 (heads 7, 12, 24, 29), 92 (heads 5, 10, 11, 13), 129, 145, 146; *Montreal City v. Montreal Street Ry. Co.* (4); *Madden v. Nelson and Fort Sheppard Ry. Co.* (5)]

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Lafleur K.C., *Clauson K.C.* and *T. Mathew* for the respondent, the Attorney-General for Canada; *Tilley K.C.* and *Pritt* for the respondent railway company. Sect. 189 of the Railway Act is *intra vires*, and applies to Provincial as well as to Dominion Crown lands. The power expressly given by s. 117 of the British North America Act, 1867, to take Provincial land for the defence of the country, refers to executive and not legislative action. That section does not mean that the Provinces shall retain their public property for all time, but merely that upon confederation each Province shall retain its own public property; for instance it must be read in conjunction with the power of sale given by s. 92, head 5. The Dominion had legislative power to pass s. 189 under s. 91, head 29, and s. 92, head 10 (a), of the British North America Act, 1867. It is a necessary implication under those heads that the Dominion can take Provincial lands necessary for a Dominion railway. That power is an exclusive power: *Wilson v. Esquimalt and Nanaimo Ry. Co.* (6). The section now in question was strictly railway legislation in its "pith and substance." In *Montreal City v. Montreal Harbour Commissioners* (3) the Board expressly observed that that case was not one to which s. 92, head 10, applied. Sect. 189 of the Railway Act would be *intra vires* even if payment of compensation

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(1) [1888] 14 App. Cas. 46, 56.
(2) [1921] 1 A.C. 413, 432.
(3) *Ante*, pp. 299, 313. (A.C.)

(4) [1912] A.C. 333.
(5) [1899] A.C. 626.
(6) [1922] 1 A.C. 202.

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was not contemplated; but sub-s. 4 appears to contemplate compensation being paid. The section does not contemplate a transfer of the property in the land, but merely the user of it for the purposes of the railway. It was merely that right which was held to have been taken in *Attorney-General for British Columbia v. Canadian Pacific Ry. Co.* (1) That decision is conclusive in the respondents' favour. The grounds upon which the appellant contends that it is not applicable have no weight. The holding as to the legislative competence to take Provincial land was a deliberate decision, intended to have equal weight with the decision based upon the view that the land was a public harbour. That decision was not based upon the agreement contained in the Order in Council; the agreement had no bearing upon the acquisition of land for the purposes of the railway. The two cases referred to in the judgment in that appeal supported the decision as to the power of the Dominion Legislature, and apply—more especially *Toronto Corporation v. Bell Telephone Co.* (2)—in the present case. The language of the Act of 1859, of which s. 133 is substantially reproduced in s. 189 now under discussion, shows (e.g., see s. 9, sub-s. 3) that the Act dealt with what are now Provincial public lands. The present distinction between Dominion and Provincial Crown lands did not then exist.

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p. 719. *Laquet K.C.* in reply. The provisions of the Railway Act, 1919, ss. 162(a), 166, 167, 168, 215, as to the expropriation of land do not apply to Crown lands.

May 17. The judgment of their Lordships was delivered by

VISCOUNT CAVE L.C. The Nipissing Central Railway Co. was incorporated by an Act of the Dominion of Canada (No. 112 of 1907) for the purposes of constructing and operating certain lines of railway, including a line extending from Latchford, in the Province of Ontario, to a point on the line of the Grand Trunk Pacific Railway in the Province of Quebec. The plan and book of reference for this line, as approved by the Board of Railway Commissioners, show a line traversing lands belonging to the Crown in right of the Province of Quebec. The statute governing the construction and operation of inter-Provincial railways in

(1) [1906] A.C. 204.

(2) [1905] A.C. 52.

Canada (other than Government railways) is the Railway Act of 1919 of Canada, which provides for the compulsory taking of lands required for a railway and for the payment of compensation for lands so taken, and the section of the Act dealing specially with Crown lands is s. 189, which is in the following terms:—

“(1.) No company shall take possession of, use or occupy any lands vested in the Crown without the consent of the Governor in Council.

“(2.) Any railway company may, with such consent, upon such terms as the Governor in Council prescribes, take and appropriate for the use of its railway and works so much of the lands of the Crown lying on the route of the railway which have not been granted or sold as is necessary for such railway, and also so much of the public beach or bed of any lake, river or stream, or of the land so vested covered with the waters of any such lake, river or stream as is necessary for making and completing and using its said railway and works.

“(3.) The company may not alienate any such lands so taken, used or occupied.

“(4.) Whenever any such lands are vested in the Crown for any special purpose, or subject to any trust, the compensation money which the company pays therefor shall be held or applied by the Governor in Council for the like purpose or trust.”

In pursuance of this section, the Nipissing Co. applied for the consent of the Governor-General in Council to the taking, for the purposes of its railway, of the Provincial Crown lands lying on the approved route; and the Government of the Province of Quebec having disputed the right of the Governor in Council to give an effective consent, the Governor in Council, under s. 60 of the Supreme Court Act, referred the questions so raised to the Supreme Court of Canada for hearing and consideration. The questions referred to the Supreme Court, with the replies given by that Court, are as follows:—

First question: Is it within the competence of Parliament to enact the provisions of s. 189 of the Railway Act, 1919, with regard to Provincial Crown lands? Answer: Yes.

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Second question: If the answer to question 1 be in the affirmative, is said s. 189, as it now stands, applicable to Provincial Crown lands? Answer: Yes.

Third question: Is it obligatory upon the Governor in Council to give his consent under the provisions of sub-s. 2 of said section upon any proper application therefor, or has he discretion to grant or refuse such consent as he may think fit? Answer: It is not obligatory upon the Governor in Council to give his consent, and he has in point of law discretion to grant or refuse such consent as he may see fit.

Against this judgment the Attorney-General for Quebec has appealed to His Majesty in Council.

As to the third of the above answers, no question is raised on this appeal; and, as the first question does not arise unless the second is answered in the affirmative, it is convenient to take the latter question first.

Their Lordships do not feel any doubt that s. 189 of the Railway Act applies, according to its true construction, to lands belonging to the Crown in right of a Province. The section applies in terms to all "lands of the Crown lying on the route of the railway," no distinction being made between Dominion and Provincial Crown lands. It is true that the only consent required by the section is that of the Governor in Council; but if any executive consent was to be required to the taking of Crown lands for the purposes of a Dominion railway, it was to be expected that the consent required would be that of the Dominion Government, for otherwise the construction of the railway would be dependent upon the consent of the Government of each Province through which it was intended to pass. It is true also that sub-s. 4 of the section appears to proceed on the assumption that all compensation money for Crown lands taken will be payable to the Governor in Council, and it is suggested that this would not be the natural destination of compensation paid in respect of lands in which the beneficial interest belongs to a Province; but this sub-section is machinery only, and there is no reason why the Governor in Council should not direct any compensation moneys received in respect of Provincial Crown lands to be handed over to the Government of the Province concerned.

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The construction so put upon s. 189 of the Act of 1919 is strongly supported by a reference to the history of the Railway Acts, which were carefully analysed in the judgment delivered by Newcombe J. on behalf of the Supreme Court in this case. The pre-Union Railway Act of the Province of Canada (22 Vict. c. 66) authorized the taking of any "wild lands of the Crown" situate on the route of the railway and this expression was repeated in the Railway Act passed immediately after confederation (the Railway Act, 1868) at a time when all such "wild lands" were necessarily Provincial Crown lands. It reappeared in the Railway Acts of 1879 and 1886, the word "wild" being omitted in the Act of 1888 and in all subsequent consolidating Acts down to and including the Act of 1919; and it is hardly conceivable that an expression which in the earlier of these statutes plainly included Provincial Crown lands was intended to have a less extended meaning in the later statutes. It is noteworthy too that the Act of 1919 was passed after it had been decided in the British Columbia case (to be hereafter referred to) that the section extended to Provincial Crown property, and without any alteration of language.

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Assuming then that the section, on its true construction, extends to the compulsory taking of Provincial Crown lands, was it within the competence of the Dominion Parliament to enact it? In other words, does the exclusive power to legislate in respect of inter-Provincial railways reserved to the Dominion Parliament by s. 91, head 29, and s. 92, head 10, of the British North America Act, 1867, empower that Parliament to authorize the compulsory taking of lands on the route of a Dominion railway which belong to the Crown in right of a Province? This question has already been considered by this Board in connection with the corresponding section of the Railway Act, 1888, and has been answered in the affirmative: *Attorney-General for British Columbia v. Canadian Pacific Ry. Co.* (1) Sir Arthur Wilson, in announcing the decision of the Board in that case, used the following language: "It was argued for

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(1) [1906] A.C. 204, 210.

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the appellant that these enactments ought not to be so construed as to enable the Dominion Parliament to dispose of Provincial Crown lands for the purposes mentioned. But their Lordships cannot concur in that argument. In *Canadian Pacific Ry. Co. v. Corporation of the Parish of Notre Dame de Bonsecours* (1) (a case relating to the same company as the present) the right to legislate for the railway in all the Provinces through which it passes was fully recognized. In *Toronto Corporation v. Bell Telephone Co. of Canada* (2), which related to a telephone company whose operations were not limited to one Province, and which depended on the same sections, this Board gave full effect to legislation of the Dominion Parliament over the streets of Toronto which are vested in the City Corporation. To construe the sections now in such a manner as to exclude the power of Parliament over Provincial Crown lands would, in their Lordships' opinion, be inconsistent with the terms of the sections which they have to construe, with the whole scope and purpose of the legislation, and with the principle acted upon in the previous decisions of this Board. Their Lordships think, therefore, that the Dominion Parliament had full power, if it thought fit, to authorize the use of Provincial Crown lands by the company for the purposes of this railway."

This judgment appears to their Lordships to be conclusive of the question now under discussion. It is true that in the British Columbia case the Board found additional support for their conclusion in the circumstance that the land there in question (which was Provincial foreshore) had been used before the Union for harbour purposes. But a substantial, if not the principal, ground for the decision is to be found in the reasoning above cited from the judgment of Sir Arthur Wilson; and their Lordships would hesitate long before departing from an opinion so clearly and emphatically expressed by this Board even if they were not wholly in agreement with it. But, in fact, no argument has been adduced in the present case which would lead their Lordships to doubt in any way the correctness of the decision reached in the year 1906. It was suggested that the effect of s. 65 of the British North America Act was to vest in the Lieu-

(1) [1899] A.C. 367.

(2) [1905] A.C. 52.

tenant-Governor of Quebec, and not in the Governor-General, the power to consent under s. 9, sub-s. 3, of the Canada Railway Act (22 Vict. c. 66) to the appropriation of Crown lands in the Province of Quebec for railway purposes; but the last-mentioned Act, although it does not appear to have been formally repealed, has been superseded by later Railway Acts, and no sound argument can now be founded upon it. It was further argued that the effect of ss. 109 and 117 of the British North America Act was to vest in each of the Provinces the beneficial interest in the Crown land situate in the Province, subject only to the right of Canada under the reservation contained in s. 117 to assume lands required for purposes of defence. But the reservation in question appears to refer to executive, and not to legislative, action; and while the proprietary right of each Province in its own Crown lands is beyond dispute, that right is subject to be affected by legislation passed by the Parliament of Canada within the limits of the authority conferred on that Parliament. Reference was made to certain passages in judgments pronounced on behalf of the Board in earlier cases, in which emphasis was laid on the view that the regulative powers conferred upon the Dominion Parliament by s. 91 of the British North America Act did not authorize that Parliament to transfer to itself or others the proprietary rights of a Province. But those expressions must, of course, be taken subject to the observation of Lord Herschell in the first *Fisheries* case, *Attorney-General for Canada v. Attorneys-General for Ontario, Quebec and Nova Scotia* (1), that the power to legislate in respect of any matter must necessarily to a certain extent enable the Legislature so empowered to affect proprietary rights; and it may be added that where (as in this case) the legislative power cannot be effectually exercised without affecting the proprietary rights both of individuals in a Province and of the Provincial Government, the power so to affect those rights is necessarily involved in the legislative power.

Upon the whole matter their Lordships find themselves completely in agreement with the judgment of the Supreme Court, and they will humbly advise His Majesty that this appeal fails and should be dismissed. The costs of the respondent, the Nipissing Central Railway Co., should be

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paid by the appellant, the Attorney-General for Canada
bearing his own costs.

ATTORNEY-
GENERAL

Solicitors for appellant: *Blake & Redden.*

FOR
QUEBEC

Solicitors for respondent company: *Lawrence Jones & Co.*

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Solicitors for respondent Attorney-General: *Charles
Russell & Co.*

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CITY OF TORONTO CORPORATION.....}

APPELLANTS;

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RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada (Ontario)—Separate School—School Building—Municipal By-law—Legislative Powers—Denominational School—British North America Act, 1867 (30 & 31 Vict. c. 3), s. 93—Separate Schools Act (R.S. Ont., 1914, c. 270), s. 45—Municipal Amendment Act (11 Geo. 5, c. 63), s. 399A.

A by-law passed by a City Council under s. 399A of the Municipal Act of Ontario, prohibiting in a certain district the erection of buildings except for use as private residences, is enforceable in respect of a school erected by the trustees of a separate school under their statutory powers. The exemption in proviso (a) to s. 399A does not apply to a building which, at the time when the by-law is passed, is not in course of erection, and of which the plans have not been approved by the city architect. The British North America Act, 1867, s. 93, does not prevent the provisions of the Municipal Act with reference to building, and other matters relating to the health and convenience of the population, from applying to denominational schools.

Judgment of the Supreme Court reversed.

APPEAL (No. 102 of 1924) by special leave from a judgment of the Supreme Court of Canada (May 22, 1924) reversing two judgments of the Appellate Division of the Supreme Court of Ontario (June 11, 1923).

The question for determination in the appeal was whether a by-law passed by the City Council of Toronto restricting the use of land in a certain area to buildings for residential purposes, was enforceable in respect of school buildings erected by the respondent trustees under their statutory powers, upon land which, under these powers, they had purchased for the erection of schools.

The facts appear from the judgment of the Judicial Committee.

The judgment of the Supreme Court of Canada (Idington J. dissenting), whereby it was held that the by-law was

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* Present: VISCOUNT CAVE, VISCOUNT HALDANE, LORD SHAW, LORD CARSON, and LORD BLANESBURGH.

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not enforceable in respect of the respondents' school buildings, is reported at [1924] S.C.R. 368.

1925. July 2, 3, *Geary K.C.* and *Hon. Geoffrey Lawrence K.C.* for the appellants.

Tilley K.C. and *J. E. Day* for the respondents.

July 28. The judgment of their Lordships was delivered by

VISCOUNT CAVE L.C. This appeal raises some important questions as to the relative rights of a School Board acting under the Separate Schools Act of Ontario and a City Council acting under the Municipal Act of that Province. By virtue of the Separate Schools Act, the Board of Trustees of the Roman Catholic Separate Schools for the city of Toronto (who will be referred to in this judgment as the "School Board") have power to acquire or rent school sites and to build and carry on schools. By virtue of the Municipal Act, the Corporation of the city of Toronto is empowered to prohibit by by-law the use of land or the erection or use of buildings within any defined area for any purpose other than that of a private residence. The question is whether, in the circumstances of this case, a by-law made by the Corporation under the latter statute is enforceable in respect of a site purchased by the School Board for school purposes.

In the year 1921 the School Board, having been evicted for the purpose of a street improvement from their school in St. Vincent Street, purchased two adjoining houses with gardens, being Nos. 14 and 18 Prince Arthur Avenue, Toronto, with the object of transferring their scholars to a new school to be erected on that site. No. 14 Prince Arthur Avenue was vacant, and the School Board obtained possession of that property on August 19, 1921; but No. 18 was let to tenants who were subject to a two months' notice to quit, and actual possession of that property was not obtained until the month of April in the following year. Immediately on obtaining possession of No. 14, the School Board, without depositing plans as required by the municipal by-laws then in force, made some structural alterations in the building with a view to adapting it for temporary use as a school; and subsequently—namely, on September 6 and 9, they deposited plans for these temporary alterations. Prince Arthur Avenue is a residential street, and on September 14

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the residents in that street, having heard of the proposal to open a school there, appealed to the Board of Control to intervene; and that Board referred to the City Council the question of making a by-law for preserving the residential character of the street, and instructed the city architect to withhold his approval of the plans deposited by the School Board pending the consideration of this question by the Council. The School Board thereupon acted with great promptness. On September 15 their architect deposited with the city architect plans for the erection of a school extending over the site of Nos. 14 and 18 Prince Arthur Avenue, and on the same day the School Board applied to the Court for a mandamus directing the city architect to consider these plans and to grant a permit both for the temporary alterations and for the erection of a school building upon the entire site. They also opened a school in No. 14 as altered, and by agreement with the tenants of No. 18 obtained possession of a part of the garden at the rear of that house, and caused it to be used as a playground for the scholars.

On September 26 the City Council met and under the powers conferred upon them by s. 399A of the Municipal Act, passed a by-law (No. 8834) in the following form:—"I. No person shall use the land fronting or abutting on either side of Prince Arthur Avenue, between Avenue Road and Huron Street, or erect or use any building on the said land for any other purpose than that of a detached private residence. II. Any person convicted of a breach of any of the provisions of this by-law shall forfeit and pay, at the discretion of the convicting magistrate, a penalty not exceeding (exclusive of costs) the sum of \$50 for each offence. III. This by-law shall take effect upon, from and after receiving the approval of the Ontario Railway and Municipal Board."

This by-law was approved, after arguments on both sides, by the Railway and Municipal Board. The application for a mandamus, having been adjourned in the meantime, was thereupon dismissed by Middleton J.; and an appeal to a Divisional Court against this dismissal was adjourned by that Court sine die to enable the School Board to take proceedings to get the by-law quashed.

Accordingly, on March 10, 1922, the School Board brought an action against the City Council and their architect,

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claiming to have the by-law declared invalid or inapplicable and consequential relief. On April 19, 1922, the City Council commenced an action against the School Board, claiming an injunction to restrain that Board from using in breach of by-law No. 8834 the part of its lands not used for school purposes prior to the passing of the by-law, being the front part of No. 18 Prince Arthur Avenue. The two actions were consolidated, and were tried by Middleton J., who dismissed the action brought by the School Board and granted an injunction as asked by the City Council. An appeal to the Appellate Division of the Supreme Court of Ontario against this judgment, and against the refusal of Middleton J. and the Divisional Court to grant a mandamus, was dismissed. The School Board applied for leave to appeal against the decision of the Appellate Division to the Supreme Court of Canada, and such leave was granted on an undertaking by the School Board to abandon as a ground of appeal any contention that the form of the by-law in question in the action, if it was completely enacted, did not correctly follow the statute pursuant to which it was passed, and also any contention that the Municipal Council in passing the by-law acted in bad faith.

On the hearing of the appeal to the Supreme Court of Canada, that Court (Idington J. dissenting) allowed the appeal and made an order that the city architect should consider the application of the School Board for a permit to erect a school building upon the premises Nos. 14 and 18 Prince Arthur Avenue, and should grant a permit for the erection of that building in accordance with the plans and specifications left with the city architect by the Board or as the same might be amended in compliance with the by-laws of the city of Toronto respecting buildings. The reasons for this decision are to be found in the judgment delivered by Duff J. on behalf of the majority of the Court, from which it appears that the decision was based mainly upon the proviso marked (a) contained in s. 399A of the Municipal Act of 1921. That section, after enacting that by-laws might be passed by the councils of cities and other municipalities for prohibiting the use of land or the erection or use of buildings within any defined area or areas abutting on any defined highway or part of a highway for any other purpose than that of a detached private residence, provided as follows: "(a) No by-law passed under this section shall

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apply to any land or building which on the day the by-law is passed is erected or used for any purpose prohibited by the by-law so long as it continues to be used for that purpose, nor shall it apply to any building in course of erection or to any building the plans for which have been approved by the city architect prior to the date of the passing of the by-law, so long as when erected it is used for the purpose for which it was erected."

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After referring to this proviso, the learned judge said (1): "The right of the owner of land, therefore, to make use of it, subject to the existing by-laws, in the erection of such buildings upon it as he thinks proper to erect, is preserved inviolate down to the point of time when the restrictive by-law is actually passed; and thereafter, in the limited degree prescribed, in the special cases mentioned. That right, as Middleton J. held in the case already cited, includes the right to receive the necessary permit for the erection of a building proposed to be erected in conformity with the law in force for the time being. It is quite manifest that in the result, if effect be given to the judgments of the Ontario Courts, this right is denied the appellants. The by-law producing this result cannot, in view of the circumstances, in our opinion, be sustained as a valid exercise of the authority given by the statute. The protection of the existing status is a substantive element in the purpose of the enactment. The by-law, passed in the circumstances in which it was passed, necessarily had the effect (and it was so designed) of depriving the appellants of the benefit of a status of which the statute guaranteed the protection. That, in our opinion, is not according to the tenor of the authority created."

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The learned judge concluded by expressing a hope that, with the co-operation of all parties concerned, it might be possible to make other arrangements which would relieve the residents of the street of the very grave detriment and hardship arising from the presence of the school, the existence of which was not disputed.

With the greatest respect for the opinion of the learned judges composing the majority of the Supreme Court, their Lordships are unable to concur in this reasoning. No doubt it is true that, unless and until a by-law restricting the

(1) [1924] S.C.R. 374.

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building upon any land is passed, the owner of the land has a right, subject to the existing by-laws, to erect upon it such buildings as he may think proper. But the whole object and purpose of s. 399A is to empower the city authority, acting in good faith, to put restrictions upon that right with a view to the protection of neighbouring owners against that "grave detriment and hardship" to which the learned judge referred; and the "status" or proprietary right of the owner is limited by the powers of the city to be exercised for the protection of his neighbours. If the reasoning of the learned judge is to be taken literally, then in every case the "status" of the building owner is to prevail, and that whether he has or has not deposited plans with a view to building upon his land; and even if the sentences quoted refer only to a case where plans have been deposited before the by-law is passed, they yet go beyond the express terms of the statute. The operation of proviso (a) is confined to cases where at the date of the passing of a by-law either (1.) a building is erected or used for a purpose prohibited by the by-law, or (2.) a building is in course of erection, or (3.) the plans for a building have been approved by the city architect; and it would appear to their Lordships to be a necessary inference from the express terms of the proviso that where plans have been deposited but not yet approved, and the building is not in course of erection, the operation of the by-law is not excluded. There may be a *prima facie* right to have the deposited plans approved; but if so, that right is negatived by the passing and approval of the by-law. It was suggested that the by-law was defective on the ground that the limitations contained in proviso (a) to the section should have been but were not embodied in the by-law itself; but having regard to the undertaking given by the respondents to abandon any contention that the form of the by-law did not correctly follow the statute, this argument was not open to the respondents on this appeal, and their Lordships accordingly express no opinion upon it.

Counsel for the defendants raised an alternative contention which is not dealt with by the judgments in the Supreme Court—namely, that the power of the city under s. 399A of the Municipal Act to prohibit the use of any land or the erection or use of any building for any purpose other than that of a private residence, cannot prevent a School Board

from erecting or carrying on a school on a site acquired by them for that purpose. Attention was called to the power given to public school trustees by the Common Schools Act of Upper Canada of 1859 (s. 79) to determine the site of schools—a power which was extended by an Act of 1863 (26 Vict. c. 5, s. 7) to trustees of separate schools—and also to s. 45 of the Separate Schools Act (R.S. Ont., 1914, c. 270), which empowers a Separate School Board to acquire or rent school sites, build school-houses and exercise other powers; and it was argued that, according to the well-known rule “*generalia specialibus non derogant*,” the general provisions of the Municipal Act must yield to the special powers given to Separate School trustees. Their Lordships do not accede to this argument. If the two sets of statutes contained provisions which were not reconcilable with one another, it would be necessary to consider which should prevail; but there is no reason why the powers of the School Board should not be exercised subject, not only in relation to the construction of the buildings to be erected upon a site, but also in relation to the suitability of the site having regard to the public convenience, to the control of the municipal authority. School Boards are public bodies and have rights given to them for educational purposes; but those rights were not intended to override the powers given to municipalities for the protection of the community as a whole.

It was further argued that the power given by s. 5 of the School Sites Act (R.S. Ont., 1914, c. 277) to the trustees of a public school to expropriate land for a school site was vested by virtue of s. 45(m) of the Separate Schools Act in the respondents, and that, as they could have taken Nos. 14 and 18 Prince Arthur Avenue compulsorily for a school site, they should not be prevented from using those premises for that purpose. In their Lordships’ opinion the respondents had no such compulsory powers until they were conferred upon them by the School Sites Amendment Act, 1922; and that Act contained proviso which prevented it from applying to or affecting any action or proceeding then pending. This argument, therefore, also falls to the ground.

A further argument was founded on s. 93 of the British North America Act, 1867, which enacts that a Provincial Legislature may exclusively make laws in relation to educa-

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tion, but provides (among other things) that “nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons had by law in the Province at the Union”; and reference was made to the case of *Ottawa Separate Schools Trustees v. Ottawa Corporation*. (1) In their Lordships’ opinion this provision has no application to the present case. It is a restriction upon the power of the Province to make laws in relation to education, but does not prevent the provisions of the Municipal Act with reference to building, and other matters relating to the health and convenience of the population, from applying to denominational schools as well as to other buildings.

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One further point requires to be noticed. The order which was made by Middleton J. and which their Lordships are asked by the appellants to restore, while saving (in accordance with proviso (a) to s. 399A of the Municipal Act) the right of the respondents to use for school purposes those parts of the premises purchased by them which were so used at the date of the passing of the by-law, contains words which appear to negative any right in the respondents to erect a new school on those parts of the premises at a future time; and it was urged on behalf of the respondents that in this respect the order went too far, and that they should be left free to erect upon those premises such school as they may think fit. In their Lordships’ opinion this is not their right. The reasonable repair and improvement of the existing school buildings, if in accordance with the by-laws relating to buildings, could hardly meet with objection; but the erection of a new building to be used for the prohibited purpose would not fall within the saving of proviso (a) of s. 399A, which is confined to “any land or building which on the day the by-law is passed is erected or used for any purpose prohibited by the by-law so long as it continues to be used for that purpose.”

For these reasons their Lordships are of opinion that this appeal should be allowed, and that the order of the Supreme Court of Canada should be set aside and the order of the

Appellate Division of the Supreme Court of Ontario restored, and they will humbly advise His Majesty accordingly. The appellants will have their costs in the Supreme Court, but, in accordance with their undertaking, they will pay the costs of this appeal.

Solicitors for appellants: *Freshfields, Leese & Munns.*

Solicitors for respondents: *Blake & Redden.*

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CITY OF MONTREAL..... APPELLANTS;

AND

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TETREAULT (SINCE DECEASED)..... APPELLANT;

AND

HARBOUR COMMISSIONERS OF } RESPONDENTS.
MONTREAL..... }

ATTORNEY-GENERAL FOR QUEBEC.... APPELLANT;

AND

ATTORNEY-GENERAL FOR CANADA.. RESPONDENT.

[CONSOLIDATED APPEALS.]

ON APPEAL FROM THE COURT OF KING'S BENCH FOR
QUEBEC, APPEAL SIDE.

Canada (Quebec)—Public Harbour—Extension of Montreal Harbour—Ownership of Foreshore and Bed of River—Dominion legislative Power—"Navigation and shipping"—Riparian Owner—Right of Access to River—Possessory Action—Civil Code of Procedure, art. 1064—British North America Act, 1867 (30 & 31 Vict. c. 3), s. 91, head 10; ss. 108, 109.

A Dominion statute of 1873 extended the limits of Montreal harbour, and a Dominion statute of 1894 purported to vest the land within the extended limits in the Montreal Harbour Commissioners. In 1914 a further Dominion statute purported to vest the harbour as extended in the Crown in the right of the Dominion, subject to the Commissioners' powers of management. The Commissioners built an embankment, and carried out other works on the foreshore of the river St. Lawrence within the limits of the harbour as extended. In consequence the City of Montreal had to divert a sewer which had carried sewage over their riparian land into the river. The City sued the Commissioners to recover the expense of the diversion:—

1926 A.C. *Held*, (1.) that the effect of ss. 108 and 109 of the British North America Act, p. 300. 1867, was to vest the harbour, as it existed at that date, in the Crown in the right of the Dominion; but, except in that respect, to vest the bed and foreshore in the Crown in the right of the Province.

(2.) That the Dominion Statute of 1873 did not enlarge the proprietary rights of the Dominion, nor enable the Dominion Legislature to take land for harbour purposes without paying compensation; if the later Dominion statutes purported to do so, they were ultra vires.

* *Present*: VISCOUNT CAVE L.C., VISCOUNT HALDANE, LORD SHAW, LORD CARSON, and MR. JUSTICE DUFF.

- (3.) That the power of the Dominion Legislature under s. 91, head 10, of the British North America Act, 1867, to make laws as to "navigation and shipping" did not empower it to authorize the Commissioners to carry out the extensive works which were complained of, but that the Province had waived its rights and sanctioned the works.
- (4.) That the City as riparian owners had not a right to discharge sewage into the river; their right to do so rested on a licence from the Provincial authorities, and that licence had been made subsidiary to the proceedings of the Harbour Commissioners; and that accordingly, the action by the City should be dismissed.

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Judgment of the Court of King's Bench varied.

Further, a riparian proprietor brought against the Harbour Commissioners a possessory action for damages based upon art. 1064 of the Civil Code of Procedure of Quebec. He claimed that, as a servitude attached to his riparian land *ex jure naturae*, he had a right of access to, and egress from, the river, and that the works above mentioned deprived him of the exercise of those rights. The St. Lawrence at Montreal is navigable but not tidal.

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Held, that the plaintiff, as a riparian proprietor, had the rights which he claimed, and that he was entitled to recover damages by means of a possessory action under art. 1064. The right claimed was not affected by the fact that the grant of the land to the plaintiff's predecessors reserved a royal highway between the land and the river.

North Shore Ry. Co. v. Pion (1889) 14 App. Cas. 612 applied.

Judgment of the Court of King's Bench reversed.

CONSOLIDATED APPEALS (Nos. 185 and 186 of 1924) from a judgment of the Court of King's Bench for Quebec, Appeal Side (May 14, 1924), affirming, with modifications, a judgment of the Superior Court (December 22, 1921).

The two consolidated appeals, which were heard together, arose out of two actions brought in the Superior Court of the Province of Quebec against the Harbour Commissioners of Montreal in consequence of extensive works carried out by the Harbour Commissioners upon the foreshore and bed of the river St. Lawrence in connection with an extension of Montreal Harbour. One action (to which appeal No. 186 related) was brought by the City of Montreal to recover as damages the expense of diverting a sewer. The other action (to which appeal No. 185 related) was brought by Tetreault, a riparian proprietor, to recover, by a possessory action based upon art. 1064 of the Civil Code of Procedure, damages for a disturbance of the right of access to and egress from the river, which he claimed as a servitude. The Attorneys-General for Canada and for the Province of Quebec intervened in both actions.

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The facts giving rise to the litigation appear fully from the judgment of the Judicial Committee.

The Superior Court dismissed both actions. Appeals to the Court of King's Bench were dismissed, subject to variations made upon appeals by the Attorney-General for Quebec. The judgment on appeal is reported at Q. R. 37 K.B. 420, and the effect of the judgments in both actions is stated in the judgment of the Judicial Committee.

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1925. July 10, 13, 14, 16, 17. *Sir John Simon K.C.*, *Atwater K.C.* and *Hon. Geoffrey Lawrence K.C.* for the appellant City.

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St. Germain K.C. for the appellant Tetreault.

Sir John Simon K.C. *Lanctot K.C.* (A.-G. for Quebec), *Hon. Geoffrey Lawrence K.C.* and *M. Alexander* for the Attorney-General for Quebec.

The foreshore and bed of the river at the locality in question are the property of the King in the right of the Province. The "public harbours" assigned to the Dominion by s. 108 and Sch. 3 of the British North America Act, 1867, are public harbours as existing at that date: *Attorney-General for Canada v. Ritchie Contracting Co.* (1) The Dominion statutes under which the works were executed, upon their construction, do not alter the ownership, nor do they purport to authorize the Commissioners to acquire land without paying compensation; s. 34 of the consolidating Act of 1894 enables the Commissioners to expropriate land upon payment of compensation. If the statutes in question purport to deprive the Province of its property they are ultra vires under ss. 91 and 92 of the British North America Act, 1867. The power of the Dominion Legislature under s. 91, head 10, as to "navigation and shipping," even if applicable, cannot be exercised so as to deprive the Province of its proprietary rights, though the exercise of the power may lawfully interfere to some extent with those rights: *Attorney-General for British Columbia v. Attorney-General for Canada* (2); *Attorney-General for Canada v. Attorney-General for Quebec*. (3) The Legislature of the Province, exercising its powers under s. 92, head 13, had enacted by art. 407 of the Civil Code that nobody should be deprived of his property for a public purpose save upon payment of a just indemnity. The appellants as riparian owners had a right of access to the river: *North Shore Ry. Co. v. Pion*. (4) The judgment

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(1) [1919] A.C. 999, 1004.
(2) [1914] A.C. 153, 172.

(3) [1921] 1 A.C. 413, 419.
(4) 14 App. Cas. 612.

appealed from was contradictory in declaring that the property was vested in the Province, but that the Dominion had a perpetual right of user; the proprietary right, whether of the Dominion or of the Province, was only a right of beneficial user, the property being vested in the Crown: *St. Catherine's Milling Co. v. The Queen*. (1) The decision in *Attorney-General for British Columbia v. Canadian Pacific Ry. Co.*(2) does not affect this case. It turned on its special facts; the land there in question was the property of the Dominion, and the works were carried out under an Order in Council which, under s. 146 of the Act of 1867, had the effect of an Imperial statute.

Lafleur K.C. for the Attorney-General for Canada. The statutes under which the Commissioners acted were intra vires of the Dominion. The Dominion had power to do everything necessary for the effectual exercise of its powers under s. 91, heads 9 and 10, s. 92, head 10, and having regard to s. 146. That power included the right to appropriate public or private property where necessary; the right to receive compensation depended solely upon the Dominion statute exercising the power: *Montreal Corporation v. Drummond*(3); *Toronto Corporation v. Bell Telephone Co. of Canada*(4); *Attorney-General for British Columbia v. Canadian Pacific Ry. Co.*(2) The last case cited cannot be distinguished from this case. The decisions of the Board as to fisheries are not applicable. The legislative powers given to the Dominions override the Provincial powers, and may be exercised so as to infringe upon Provincial rights.

Geoffrion K.C. and *Meredith K.C.* for the respondent Commissioners. The Acts were intra vires, but that question does not really arise, as the actions were not maintainable. The municipal right of drainage was by licence from the Province, and has always been subject to the extension of the harbour; that position has been recognized by the Legislature of Quebec and by judicial decisions, and was accepted by the municipality. The plaintiffs' rights as riparian owners did not give them the rights they claimed in the actions. The principle of *North Shore Ry. Co. v. Pion*(5) should not be extended to non-tidal waters. [On the question of the right of access reference

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(1) (1888) 14 App. Cas. 46.

(2) [1906] A.C. 204.

(3) (1874) 1 App. Cas. 384.

(4) [1905] A.C. 52.

(5) 14 App. Cas. 612.

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was made also to *Bell v. Quebec Corporation*(1) ; *Chaurest v. Pilon*(2) ; and Civil Code, art. 503.] The action by Tetreault was a possessory action, and that form of action did not lie, for the reasons pointed out in the judgment appealed from.

Sir John Simon K.C. in reply referred to *Ontario Mining Co. v. Seybold*(3) ; *Attorney-General for British Columbia v. Canadian Pacific Ry. Co.*(4) ; *Canadian Pacific Ry. Co. v. Toronto Corporation*(5) ; *Attorney-General v. De Keyser's Royal Hotel*(6) ; and to the Interpretation Act (R.S. Can., 1906, c. 1), s. 16.

St. Germain K.C. replied for the appellant Tetreault.

Nov. 10. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. These appeals were heard together. There are questions of law which are common to both, as well as issues of fact which present some analogies. It will be convenient to deal with the appeal of the City of Montreal in the first place, in a judgment which will extend to both appeals, but will be based on certain considerations which are materially different in the two cases.

The appeal of the City of Montreal is brought from a judgment of the Court of King's Bench of the Province of Quebec, which dismissed an appeal by the City from a judgment of the Superior Court, refusing its claim for a sum of \$110,086.50, with interest and costs. The question disposed of related to the right of the City to recover from the Harbour Commissioners the expense it had incurred in changing the outlet of a sewer into the river St. Lawrence, an expense said to have been caused by the unlawful action of the Commissioners in erecting certain works on the bed and foreshore of the river, and the further expenses incurred as extras, due to alterations insisted on in the construction of the sewer by the Commissioners during the progress of the work done.

The questions of law which arose related, in part at least, to the effect of certain Dominion statutes purporting to vest the control of the Harbour of Montreal, as it has grown to be, in the Commissioners, and to extend the limits of the har-

(1) (1879) 5 App. Cas. 84.
(2) (1908) Q.R. 17 K.B. 283.
(3) [1903] A.C. 73, 79.

(4) [1906] A.C. 204.
(5) [1911] A.C. 461, 477.
(6) [1920] A.C. 508, 525.

bour so as to include the site on which the works in question are built. It was the questions of law so raised that occasioned the intervention of the two Attorneys-General. The judgments affirmed the substantial operation of the legislation of the Dominion Parliament, but it was held that this did not have the effect of vesting the property in the solum in the Crown in right of the Dominion Government.

In 1898 one Viau built in its first form the sewer already referred to on his own land, in accordance with a general drainage scheme approved by the town of Maisonneuve, in which it was situated. The sewer was cylindrical, and was made of brick with a diameter of about four feet. It ran along the line of a street called First Avenue into the deep water of the river. Maisonneuve was a town on the island of Montreal adjoining the city in the downstream direction. After the present litigation was commenced this town was incorporated with the City of Montreal, which was thereupon substituted as plaintiff in this action.

The respondents are a corporation which at the time of confederation had control of the Harbour of Montreal, and the harbour as it then stood became, under the provisions of the British North America Act, the property of the Crown in right of the Dominion. At the date of confederation the harbour terminated on the north side of the river at the point where a stream called the Ruisseau Migeon discharges into the St. Lawrence, and did not include the land beyond and lower down in question in this litigation. By 1901 Viau had parted with his sewer and the site of the street called First Avenue, and they have become the property of the City. The sewer has since then been connected with other sewers and drains under the control of the City.

In 1873 a Dominion statute of that year purported to extend the limits of the harbour down the river from Ruisseau Migeon to a point opposite the church of the parish of Longue Pointe, following the river along the high water mark and including the beach. In 1894 a later Dominion statute confirmed the boundaries as already established, and purported to vest the land within them in the Commissioners. By a Dominion statute of 1909 the harbour was vested in the Commissioners as a corporation. In 1914 a further Dominion statute provided that, notwithstanding previous statutes, the harbour, with all that belonged to it, were, subject to the jurisdiction and powers of management

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of the Commissioners, the harbour authority, vested in the Crown in right of the Dominion.

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In 1905 the Commissioners commenced building an embankment along the foreshore of the river, in front of the land, to which the City derived title through Viau. The objects included the construction of a railway along the foreshore for the purpose of facilitating the use of the harbour. The Commissioners intimated to the Maison-neuve authority that if it wished to carry any drains or sewers through this embankment, it should apply at once to the Commissioners, so that arrangements might be made for the carrying out by it of the works required. The authority replied that it would be willing to extend the sewer in question in these proceedings to the line of the railway, but under reservation of all its rights to extend its sewers beyond that line if it required to do so. It was resolved that the Mayor of Maisonneuve should enter into a written agreement dealing with the matter. However, in the end no such agreement was come to, and no alteration or extension by the town was found necessary for the sewers at any time between 1908 and 1911.

In 1910 the Harbour Commissioners entered into a contract with Bickers Sons & Maxim, Ltd., for the construction in the locality in question of a floating dry dock and ship repairing plant. In pursuance of this contract, the harbour authority commenced operations within the limits assigned to them on the foreshore of the river, which included the laying down of lines of railway and the construction of quays. These were said to have resulted in the removal of gravel and soil from the bed, which were heaped up, with the consequences that the sewer became useless.

In 1910 the town of Maisonneuve commenced proceedings for an interlocutory injunction to restrain the harbour authorities from the further construction, within their territorial limits, of works on the foreshore and bed of the St. Lawrence opposite First Avenue (already referred to). The answer made by the harbour authorities was that what they were doing was within their powers, and that the town of Maisonneuve had no title to send its sewage into the navigable waters of the river, but that the harbour authorities had always been willing to let the town extend its sewers at its own expense, and that, without prejudice to their rights, the harbour authorities were willing to give

facilities for the extension of the sewers through the harbour works, provided the plans were approved. The injunction was refused by the Superior Court, and this refusal was confirmed by the Court of Appeal.

In 1911 the Legislature of the Province of Quebec passed a statute giving authority, so far as the rights of the Province in the river and its banks were concerned, for the extension of the sewer. The Municipal Council of Maisonneuve was thereby authorized to make any arrangements with the Harbour Commissioners respecting sewers emptying into the river which it might consider to be in its interest, and to execute the necessary works. It was authorized to build or prolong the extension of the main sewer of First Avenue into the river through the jetty or graving dock which the Harbour Commissioners were building in front of First Avenue. To ensure the efficacy of the sewerage system, built by the town under the authority of its charter and the amendments of it, the town might, as in the past, empty its sewers into the river. The section conferring these powers was, however, not to affect the rights, privileges, and powers of the Harbour Commissioners.

There followed negotiations between the town and the Commissioners, which did not result in any agreement. The town in particular refused to defray its own costs of the works required. Plans were, however, prepared by the town which, in their general features, the Commissioners expressed themselves as prepared to accept, but only if certain permissions were asked from them and a definite agreement come to. These things did not happen. In the end the town entered on its own account into a contract with the Harris Construction Company for the extension of the sewer for a sum of \$64,290.00. Work was commenced under this contract. Before long the Harbour Commissioners objected that the sewer was being laid inside the harbour boundaries, and insisted on its being removed outside.

In 1912 the town of Maisonneuve commenced an action against the Commissioners for \$64,290.00 as damages caused by the Commissioners in wrongly depriving the town of its right of access to the river. The Commissioners answered, among other things, that the boundaries between the harbour and the property of Viau, the predecessor in title of the town, had been fixed in 1887, and that the town had

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no right to carry its drains into the river through the land of the harbour authorities. Before the action proceeded to judgment, the town was by a statute annexed to and incorporated with the City of Montreal.

The City adopted the action, and was substituted in it as plaintiff instead of the town. It claimed further damages, amounting to \$45,196.50, for the additional expenditure caused by the unlawful action of the harbour authority in interfering with the construction of the sewer. It denied that the Dominion statutes, relied on by the harbour authority as extending the limits of the harbour beyond those in existence at the passing of the British North America Act in 1867, and affecting property rights in the extended harbour, had the effect of vesting the solum in the harbour authority, and claimed that, so far as these statutes purported to do so, they were invalid. Thereupon the Attorneys-General for the Province and for the Dominion intervened in the proceedings.

The action came on for hearing in the Superior Court of the Province. Evidence was called on both sides, and in December, 1921, Lafontaine J. gave judgment. The judgment of the Superior Court dismissed the whole of the claims of the City of Montreal with costs, as also the claim of the Attorney-General of the Province of Quebec. The intervention of the Attorney-General of the Dominion was allowed with costs. The reasons for his judgment given by Lafontaine J. were: (1.) that the boundaries fixed by the Provincial Legislature for the City as a Municipal Corporation gave it no proprietary rights, and in particular did not vest in the City any property in the bed or foreshore of the river; (2.) that power was given to the Dominion Parliament by the British North America Act to legislate as to harbours and navigation, and that the only part of the Dominion statutes which could be challenged was the vesting of the land of the Province in the Dominion Government when the harbour was extended, but that as against the City the Harbour Commissioners had been in possession for many years before the City; (3.) that the banks and bed of the river at the place in controversy were within the harbour, and were public property, and that it was no concern of the City whether the title was in the Dominion or the Province; (4.) that the City had no right to carry its sewers into the harbour quite apart from the question of

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property; (5.) that the material part of the river bank was, at the time when the sewers were carried through it, in the lawful possession of the Commissioners with the implied assent of the Province, and the works complained of were made within the boundaries fixed between the Commissioners and the town of Maisonneuve, so that the Commissioners were within their rights in requiring the City to modify its plans; (6.) without pronouncing on the legality of the Dominion statutes extending the harbour, the intervention of the Attorney-General for the Province was not justified, as the City failed on the other points.

The City and the Attorney-General for the Province then appealed to the Court of King's Bench of Quebec. Judgment was given in this appeal on May 14, 1924, by Flynn, Thellier, Bernier, Letourneau and Hall JJ. The appeal of the City of Montreal was dismissed. As regards the appeal of the Attorney-General of the Province the Court allowed the appeal to the extent of holding that the bed of the river and the foreshore at the place in question were vested in the Province, but that the Dominion statutes relating to the harbour were not *ultra vires*, because on their true construction they did not of necessity imply any vesting of the property in the Crown in right of the Dominion, but only controlled its use for the purposes of a harbour, which control included the right to erect all necessary structures. Flynn J., however, went further, and thought that the statutes in question were in part *ultra vires*. The Attorney-General for the Dominion was ordered to pay the costs of the Attorney-General for the Province.

In the "considérants" on which these judgments are founded, it is laid down that the works in controversy have been made on the banks and bed of the river, that they are part of the harbour, and that all that was done in executing them was done by the authority of the Government of the Dominion or under laws passed by its Parliament. The considérants go on to state the extension of the harbour beyond the Ruisseau Migeon down to the church of Longue-Pointe, so that the extended harbour comprised the whole of the bank adjoining the town of Maisonneuve. They state, further, that the banks and bed of the river belong to the Province of Quebec, but that the Dominion Government has the right, when it is constituting or extending a harbour, to make use of the banks and bed without the

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consent of the Province, and to execute the works which it thinks necessary. Against the harbour authority, which had got these rights, the town of Maisonneuve could not expect to enter on its own works without being interfered with by the authority as the harbour progressed, and the town could certainly acquire no rights inconsistent with those of the authority. The considérants went on to advert to the Provincial Act of 1911, already referred to, and to say that the only authority granted to the town by the Legislature of the Province was in terms subordinated to the rights of the harbour authority. This was a reason why the authority could not be held responsible for the expenses incurred by the City. It was quite true that the Attorney-General for the Province was justified in claiming the property of the banks and bed, and if the Dominion had really set up a title under its statutes to the property in these, the Court would have been unanimously adverse to the validity of the statutes, but, with the exception of Flynn J., the members of the Court were of the opinion that no such claim was made in the legislation in question. Although Flynn J. took a different view from his colleagues on the question of ultra vires, he concurred in the result of the judgment. In his opinion, the City had the right to drain into the river if it could do so without committing a nuisance, but if, owing to works lawfully constructed, it could not avoid committing a nuisance, it must seek access to the river elsewhere. When the City applied to the harbour authority in 1911 and altered the projected course of its proposed sewer in response to the objection of the latter, he thought that it had waived any rights it had. Nor was it clear that even if its rights remained there was any ground, either in contract or in tort, on which it could claim the expenses incurred. His view as to ultra vires did not affect these questions, which depended on the regulative power of the Commissioners.

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Their Lordships think that it will be convenient to advert in the first place to the relevant powers of the Dominion Parliament and executive under the British North America Act. Sect. 109 enacts, among other things, that all lands belonging to the old Province of Canada at the Union are to belong to the Provinces of Ontario and Quebec in which the same are situated. But this section is qualified by the immediately preceding s. 108, which provides that the

public works and property of such Province enumerated in the third schedule to the Act are to be the property of Canada. The third schedule includes public harbours, piers and river improvements. It has been settled by decisions of this Board that the words "public harbours" include only public harbours as they existed and stood at the date of confederation, unless in the case of new Provinces incorporated subsequently, a case which does not arise here. These sections are concerned with proprietary rights, and while treating all property as vested in the Crown, determine whether it is so vested in right of the Province or of the Dominion; but there are other provisions in the British North America Act which deal, not with the ownership of property, but with the power to regulate by legislation the user of property, and these are important in the consideration of the present case. Under s. 91 exclusive legislative authority is given to the Dominion Parliament in the matters of navigation and shipping. Under s. 92, head 10, lines of steam or other ships, railways, canals, telegraphs and other works and undertakings connecting a Province with any other Province, or extending beyond the limits of a Province, lines of steamships between a Province and any British or foreign country, and such works as although wholly within a Province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more Provinces, are all taken out of the legislative authority of the Provinces and placed (by s. 91, head 29) exclusively under that of the Dominion Parliament.

It is not open to the Attorney-General for the Dominion in the case before their Lordships to invoke the authority given by s. 92, head 10, to the Dominion Parliament to declare any works to be for the general advantage of Canada, for no such declaration has been made as to the works now in question; and the decision must depend on the other sections quoted and on the facts of the case. In their Lordships' opinion the effect of ss. 108 and 109 of the Act of 1867 was to vest Montreal Harbour as it then existed in the Crown in right of the Dominion, but except in that respect to vest the bed and foreshore of the St. Lawrence in front of Montreal and Maisonneuve in the Crown in right of the Province of Quebec. The Dominion statute of 1873, while it was effective to extend the harbour as a harbour and to vest in the Dominion Parliament and in the

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Harbour Commissioners the right to make due provision for the control and protection of shipping in the harbour as extended, did not enlarge the property rights of the Dominion or enable the Dominion Parliament to take land for harbour purposes without compensation; and if and so far as the Dominion statutes of 1894, 1909 and 1914 purported to vest in the Commissioners or in the Crown in right of the Dominion the solum of the extended harbour, those statutes were in excess of the powers of the Dominion Parliament.

But the question remains whether s. 91, head 10, of the Act, which empowered the Dominion Parliament to legislate as to navigation and shipping, empowered that Parliament to authorize the extensive works undertaken by the Commissioners on the banks and foreshore and in the bed of the river. In considering this question it is necessary to bear in mind the nature of those works. They include, not only dredging operations, but an embankment and railway on the shore of the river, quays, a dry dock and ship repairing plant, and it would appear to be impossible that works of this character and extent could be constructed and used without an exclusive occupation of the soil equivalent to possession. Now there is no doubt that the power to control navigation and shipping conferred on the Dominion by s. 91 is to be widely construed. As was pointed out by Lord Herschell in the judgment which he delivered on behalf of the Board in *Attorney-General for the Dominion v. Attorney-General for the Provinces* (1)—namely, the first of the three *Fisheries* cases—the terms on which those powers are given are so wide as to be capable of allowing the Dominion Parliament to restrict very seriously the exercise of proprietary rights in a fashion which, to a great extent, depends on the discretion of that Parliament. What was said in that case about the enactment of regulations and restrictions in matters relating to fisheries being excluded from the competence of the Provincial Legislatures applies not less to matters relating to navigation and shipping. But while this is so, it does not appear to their Lordships that the right of the Dominion extends so as to authorize them to vest in a body like the Commissioners an exclusive right to occupy property of the Province without compensation and to erect upon it permanent works, such as quays,

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(1) [1898] A.C. 700, 713.

docks and railways. It may well be that when the interests of navigation require it the Dominion Parliament has authority to authorize the compulsory acquisition of lands on the terms of paying compensation; and it is to be noticed that the Acts of 1873 and 1894 contain provisions of that nature. Their Lordships do not desire to throw any doubt upon the validity of those provisions. But in the present case no attempt to apply them was made by the Commissioners, who took possession of and occupied the foreshore and bed without following the procedure laid down by the Railway Act; and in their Lordships' view the provisions of s. 91, head 10, standing alone did not justify their proceedings.

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But this by no means disposes of the case. It was undoubtedly within the power of the Province of Quebec, with a view to the improvement of the harbour of Montreal, to waive her strict legal rights and expressly or by inference to sanction the works undertaken for that purpose, and it must be considered whether such a sanction is to be inferred in the present case. In their Lordships' opinion it is. The Commissioners commenced to build their embankment in the year 1905, and the contract for the dry dock and ship repairing plant was entered into in 1910; but the Province took no part in the proceedings for an injunction, and in 1911 the Provincial Legislature passed the Quebec statute of that year, which referred to and impliedly sanctioned the operations of the Harbour Commissioners. It was not until the year 1919, when the works were far advanced, that the Attorney-General of Quebec intervened; and although at the time of his intervention he claimed to have the Commissioners excluded from possession of their works, he has at no time insisted on that claim, and is content to have the legal rights in the bed and foreshore of the river determined. Having regard to all these facts, their Lordships are satisfied that the Provincial authorities have waived any claim to interfere with the existing works, and that, so far as they are concerned, they are bound by what has been done.

The position of the City of Montreal is different, as the rights (if any) of the City authorities have at no time been waived; but in their Lordships' opinion no right of the City has been infringed. The claim put forward on their behalf that, as owners of the soil of First Avenue, they have a common law right to discharge through the end of that

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street where it abuts on the St. Lawrence the sewage of the City involves an extension of riparian rights which their Lordships cannot accept. The only right of the City to discharge their sewage into the river rests on the licence of the Provincial authorities, which was itself (as the statute of 1911 shows) made subsidiary to the proceedings of the Harbour Commissioners. The appeal of the City therefore fails.

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In the result their Lordships are of opinion that the judgment of the Court of King's Bench should be affirmed so far as it dismissed the appeal of the City of Montreal, and so far as it declared that His Majesty, representing the Province of Quebec, was the sole owner of the foreshore and bed of the St. Lawrence at the place where the Commissioners constructed their works; but that the remainder of the judgment should be dissolved, and in lieu thereof it should be declared that the statutes of the Dominion did not authorize the respondents, the Harbour Commissioners, to enter upon and take possession of the lands of the Province without compensation, but that, in view of the undertaking of the Attorney-General for the Province of Quebec not to interfere with the existing works, no order shall issue which would affect the present possession and use of the works of the Harbour Commissioners. As to costs, their Lordships will humbly recommend that the City of Montreal should pay the costs, as directed by the Court below, and also of this appeal, but that neither of the Attorneys-General should pay or receive costs, either here or in the Courts below.

THE TETREAULT APPEAL.

Their Lordships having now disposed of the appeal of the City of Montreal turn to that of Tetreault. This appeal, as they have already observed, involves considerations of a different order from those in the former appeal, which turned, among other things, on acquiescence. In the Tetreault case there has been no such acquiescence, and the question is purely one of legal title. The action was a possessory one based on art. 1064 of the Civil Code of Procedure of the Province of Quebec, which enacts that "the possessor of any immovable or real right, other than

a farmer on shares or a holder by sufferance, who is disturbed in his possession, may bring an action on disturbance against the person who prevents his enjoyment, in order to put an end to the disturbance and be maintained in his possession."

The article goes on to say that "the action may be brought by any person who has had possession of an immovable or real right for a year and a day against any person who has forcibly dispossessed him."

Tetreault alleged that he was and had been for a number of years possessor as proprietor by valid titles of three contiguous immovable properties in the parish of Longue Pointe on the Island of Montreal, of a width of about four arpents and a-half, bounded by the river St. Lawrence, and that since he purchased these immovables he had always peacefully enjoyed them with the advantages and servitudes that belong to riparian proprietors *ex jure naturae*, including the use of the water in front of his properties and access to and egress from the river; that the Harbour Commissioners were executing works opposite these properties which have encroached on them and have deprived him of his access to the river and of the privileges mentioned; that the harbour authorities had no right to carry on these works without previous expropriation, and that no Federal legislation could be operative to take away his property. He claimed damages to a total of \$133,020, and declarations as to his title and right to peaceful possession. The Harbour Commissioners asserted in answer a superior title and denied responsibility for what they had done. As the question of the validity of the Dominion statutes vesting his property in the bed and beach in the Crown in right of the Dominion arose, the Attorney-General for Quebec intervened in this appeal also, as well as the Attorney-General for the Dominion. The former maintained that the title to the beach and bed was vested in the Province, the latter that it was vested in the Dominion.

The land to which Tetreault laid claim is situated at some distance further down the river than that in the last appeal. It is in the parish of Longue Pointe, and their Lordships think that Tetreault has established his title to it. The Courts below did not declare that the works executed by the Commissioners (within whose present limits the property lies) had not encroached on Tetreault's property, but they

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thought that there was doubt as to the line of the high water mark of the river, and that as Tetreault had not established the line by a preliminary action of "bornage," the Court could not order the reinstallation of Tetreault. Into this question their Lordships do not deem it necessary to enter. They think, with Letourneau J., that there is a "bornage" in the high water line of the river sufficiently established to enable Tetreault at least to say that if he had rights of access to the river at all, these rights have been interfered with by the Commissioners.

Before entering on this question reference must be made to the course taken by the proceedings. The action was tried by Lafontaine J. in the superior Court. He dismissed it with costs. A large amount of evidence had been taken, but the learned judge thought that Tetreault had failed in his proof. He rejected the claims of both the Attorneys-General, saying that the Attorney-General for the Province had not brought a proceeding of a kind appropriate to the circumstances, and should, if his case was to be dealt with, have instituted a proper petitory action. This being so, there was no necessity for pronouncing a judgment in favour of the claims of the Attorney-General for Canada against him.

Tetreault and the Attorney-General for Quebec both appealed, and the appeal was disposed of by the Court of King's Bench (consisting of Flynn, Tellier, Bernier, Letourneau and Hall JJ.) on May 14, 1924. A majority of four affirmed the judgment of the Superior Court; Letourneau J. dissenting. The majority agreed with the trial judge that the evidence was insufficient for the establishment of encroachment on the property of Tetreault in the absence of a decree of "bornage," and that, therefore, in this merely possessory action the right of access could not be established. Letourneau, J., on the other hand, considered that there was a sufficient "bornage," for the line of high water mark was the natural and legal boundary of Tetreault's land, and no further proof of it than had been given was necessary. He would have approved interference with Tetreault's title to the land taking place, if the question arose, only on the footing of expropriation with compensation, which the harbour authorities had not offered. The majority were, however, adverse on this point to Tetreault because he had not claimed on this footing, though they

considered, notwithstanding this, that there might be a right in him as a riparian proprietor to access to the river. Such a right of access or servitude could not be established in a merely possessory action, for it might turn out to be subject to public rights of user.

Their Lordships would be unwilling, were the question really one of the exact boundary between the land, the property of Tetreault and the land where the works of the Commissioners were situated, to interfere with the concurrent findings on the evidence of the two Courts below. But they are of opinion that this question is not the real one. The boundary of the property possessed by Tetreault seems beyond doubt to have extended to high water mark whatever the line of high water mark might be established as being. If this be so, the question at once arises whether he was entitled, not by prescriptive servitude, but *ex jure naturae*, to rights of access to the river.

This question came under consideration by this Board in the case of *North Shore Ry. Co. v. Pion*.⁽¹⁾ The railway company had made a railway on the foreshore of a tidal and navigable river, along the frontage of the landowner's property, and had substantially interfered with his access to the river. It was held that by the French law prevailing in Quebec the landowner as riparian owner had the same rights of accès et sortie as he would have had if the river had not been navigable; and that the obstruction of these rights without Parliamentary authority was an actionable wrong. In the present case the St. Lawrence opposite the neighbourhood of Montreal is not tidal like the river St. Charles in *Pion's* case.⁽¹⁾ It is only navigable. But their Lordships think that this makes no difference, for the case of a river which is non-tidal, although navigable, is one to which the principles laid down by Lord Selborne in *Pion's* case (1) must apply a fortiori.

In delivering the judgment of the Judicial Committee, consisting of Lord Watson, Lord Bramwell, Lord Hobhouse and Sir Richard Couch besides himself, Lord Selborne said that the view of the Court of Queen's Bench could not be maintained, that, inasmuch as the beach of the river was public property, the landowner had no individual right, but only one to use it in common with other inhabitants of

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the country, and that the supreme Court of Canada was right in taking a contrary attitude. He adopted, as applicable as much in Quebec as in England, the principle laid down by Lord Cairns in *Lyon v. Fishmongers' Co.* (1), that the right belonging to the owner of riparian land is different from the mere public right of navigation. "When this right of navigation," said Lord Cairns, "is connected with an exclusive access to and from a particular wharf, it assumes a very different character. It ceases to be a right held in common with the rest of the public, for other members of the public have no access to or from the river at the particular place; and it becomes a form of enjoyment of the land, and of the river in connection with the land, the disturbance of which may be vindicated in damages by an action, or restrained by an injunction."

Lord Selborne went on to point out that although the bank of a tidal river of which the foreshore is laid bare at low water is not always in contact with the flow of the stream, it is in such contact for a great part of every day in the ordinary and regular course of nature. This is an amply sufficient foundation for a natural riparian right. Moreover, although the solum of the river is in some one else than the riparian owner, that can make no difference. Lateral contact with the riparian land is sufficient.

Their Lordships have had their attention directed to the reservation, inserted in the grant to Tetreault's predecessors in title, in which the grantors, the Company of New France, in 1640, declared that the concession should not cause any prejudice to the freedom of the navigation, which is to be common to all the inhabitants of New France, and throughout all the places therein above conceded, and for this purpose that there should be left a royal highway of twenty toises in width all round the island of Montreal, from the river to the granted lands, and a similar distance on the river St. Lawrence from the brink of the same to the granted lands, the whole for the use of the said navigation and of passage by land. This was a mere reservation of a right of highway which, in the view their Lordships take of the case, cannot affect Tetreault's right of access, even if it extended beyond the foreshore of his land.

(1) (1874) 1 App. Cas. 662, 671.

Their Lordships, therefore, base their judgment not on any determination of the precise boundaries of Tetreault's proprietary title, but on the view that he, as the owner of the three contiguous immovables in the parish of Longue-Pointe on the Island of Montreal, referred to in his declaration, the boundary of which extended to high water mark, had been disturbed without legal justification in his right of accès et sortie to the river. They think that the doctrine laid down in *North Shore Ry. Co. v. Pion* (1) applies not less to Tetreault's case.

They are of opinion that Tetreault was entitled to bring a possessory action claiming damages for disturbance of his rights of accès et sortie. The judgment of the Court of King's Bench should therefore be reversed. But as their Lordships are not in a position to estimate the amount of those damages, the case must go back to the Superior Court to have the amount ascertained. It may be that the Commissioners could have expropriated him in respect of their rights under s. 34 of their statute of 1894, or possibly by making use of the Railway Act of 1888, s. 144, or otherwise, and, if so, this will have to be taken into consideration in estimating his real loss. No such attempt appears to have been made, and their Lordships will therefore humbly advise His Majesty in the sense just indicated.

The Harbour Commissioners must pay Tetreault's costs here and below. The two Attorneys-General will neither have nor pay costs at any stage in the litigation.

Solicitors for appellants: *Blake & Redden*.

Solicitors for respondents, the Montreal Harbour Commissioners: *Lawrence Jones & Co.*

Solicitors for respondent, Attorney-General for Canada: *Charles Russell & Co.*

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| July 18. | CANADIAN PACIFIC RAILWAY COMPANY..... | } RESPONDENTS. |

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p. 934.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Legislative Power of Province—Taxation—Indirect Tax—Fuel-Oil Tax Act (R.S.B.C., 1924, c. 251)—British North America Act, 1867 (30 & 31 Vict. c. 3), s. 92, head 2.

A tax imposed by a Provincial legislature, in respect of a commodity, is an indirect tax, and therefore ultra vires under s.92, head 2, of the British North America Act, 1867, if from the terms of the Act there appears an expectation and intention that the person required to pay the tax will indemnify himself upon a resale of the commodity taxed, even if in the case under consideration no re-sales have taken place. The principle of construction laid down in *Attorney-General for Manitoba v. Attorney-General for Canada* [1925] A.C. 561, following earlier decisions, does not depend upon the special circumstances of individual cases.

Accordingly, An Act of the legislature of British Columbia requiring that every person who shall purchase within the Province fuel-oil for the first time after its manufacture in, or importation into, the Province, is invalid under s. 92, head 2; it was not necessary to decide whether it was ultra vires also as relating to excise.

Judgment of the Supreme Court of Canada [1927] S.C.R. 460 affirmed.

APPEAL (No. 65 of 1927) by special leave from a judgment of the Supreme Court of Canada (February 1, 1927) affirming a judgment of the Court of Appeal of British Columbia (June 14, 1926), which affirmed a judgment upon the trial of an action.

The action was brought in the Supreme Court of British Columbia by the appellant against the respondent company, who were purchasers and consumers of fuel-oil in the Province, for an account and to recover tax claimed to be due under s. 6 of the Fuel-Oil Tax Act (R. S. B. C., 1924, c. 251), which was first enacted as c. 71 of the Statutes of the Province for 1923.

1927 A.C.
p. 935. The question involved in the appeal was whether the above Act was ultra vires under the British North America Act, 1867.

* *Present:* VISCOUNT HALDANE, LORD ATKINSON, LORD BLANESBURGH, LORD DARLING, and LORD WARRINGTON OF CLYFFE.

The provisions of the Act in question, and the facts of the case, sufficiently appear from the judgment of the Judicial Committee. The evidence at the trial showed that the respondents purchased the fuel-oil for consumption, and did not resell it; also that as a general rule there was no buying of fuel-oil in British Columbia for resale, resale having taken place in only two or three isolated cases by the Union Steamship Company.

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The trial judge, Morrison J., dismissed the action on the ground that the Act was ultra vires under s. 92, head 2, of the British North America Act, 1867. The judgment was affirmed by a majority upon an appeal to the Court of Appeal of British Columbia, whose decision was affirmed by the Supreme Court of Canada (Anglin C. J. and Duff, Mignault, Newcombe and Rinfret JJ.; Idington J. dissenting). The appeal to the Supreme Court is reported at [1927] S. C. R. 84.

1927. July 1, 4. *J. W. de B. Farris K.C. and Hon. Geoffrey Lawrence K.C.* for the appellant. The tax is a direct tax and consequently valid under s. 92, head 2, of the British North America Act, 1867. In applying the test laid down in decisions of the Privy Council regard must be had to the actual operation of the tax, which must be taken to have been known to the legislature. The evidence shows that the appellants bought entirely for their own consumption; it does not appear that other purchasers had effected resales, except in two or three isolated cases, which arose in exceptional circumstances and were not shown to have been at prices including the tax. If the tax was a direct tax, it is not material to consider whether in one aspect it is excise.

[Reference was made to *Attorney-General for Quebec v. Reed* (1); *Bank of Toronto v. Lambe* (2); *Brewers' and Maltsters' Association v. Attorney-General for Ontario* (3); *Cotton v. The King* (4); and *Attorney-General for Manitoba v. Attorney-General for Canada*. (5)]

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p. 936.

E. P. Davis K.C., Tilley K.C. and J. E. McMullen for the respondents were not called upon.

- (1) (1884) 10 App. Cas. 141, 143,
144.
(2) (1887) 12 App. Cas. 575, 581-
583.

- (3) [1897] A.C. 231, 236.
(4) [1914] A.C. 176, 190-195.
(5) [1925] A.C. 561.

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July 18. The judgment of their Lordships was delivered by

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VISCOUNT HALDANE. This is an appeal from a judgment of the Supreme Court of Canada dismissing an appeal brought to it from the Court of Appeal of British Columbia, which in its turn dismissed an appeal from a judgment of Morrison J.

The question which has been decided is concerned with the validity of the British Columbia Fuel-Oil Tax, 1923, and especially with s. 3 and s. 6 of that Act. It is contended for the respondents that under s. 92 of the British North America Act there was no power in the Provincial Legislature to pass the statute, the ground being that the taxation attempted is not "direct."

The purpose was to enact that every person who purchases within the Province fuel-oil sold for the first time after its manufacture in or importation into the Province should pay for Provincial purposes a tax equal to one-half cent per gallon on the oil so purchased. By the definition clause "purchaser" is to mean "any person who within the Province purchases fuel-oil when sold for the first time after its manufacture in or importation into the Province." "Vendor" is to mean "any person who within the Province sells fuel-oil for the first time after its manufacture in or importation into the Province." By s. 3 the purchaser is to pay the tax as so defined. By s. 4 the vendor, on the sale to the purchaser, is to levy and collect and pay it over to the Government. By s. 6 every person who has in his possession for use or consumption fuel-oil on which the tax has not been paid is to pay it. The rest of the Act forbids the use of fuel-oil unless the tax has been paid, makes an exception from liability to the tax for fuel-oil used in the operation of vessels plying between ports in the Province and ports outside the Dominion; and imposes penalties.

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p. 937.

The first and cardinal question is whether the tax is direct or indirect within the meaning of the expressions used in ss. 91 and 92 of the British North America Act. If the tax is indirect, the respondents escape wholly. Their Lordships entertain no doubt that within the meaning placed on the language employed by a series of decisions in the Canadian Courts and in the Privy Council, the tax is indirect. If so, the statute in question was *ultra vires*.

In *Attorney-General for Manitoba v. Attorney-General for Canada* (1) the Board held invalid an Act of Manitoba to impose a tax on persons selling grain for future delivery, notwithstanding that the Act declared in terms that the tax was a direct one. There was in that case an agreed statement that the ultimate price of the grain, which was called a "world price," was fixed, was but little controlled by the producers, and had to be looked to as covering all the items in cost of production and transportation.

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It was laid down by the Board that while a direct tax is one that is demanded from the very person who it is intended or desired should pay it, an indirect tax is that which is demanded from one person in the expectation and with the intention that he should indemnify himself at the expense of another, as may be the case with excise and customs. A tax levied, as in that case the tax was, on brokers and agents and factors, as well as on sellers, obviously fell within the definition of indirect taxation. The meaning of the distinction had been settled by the exposition given of it by the political economists, whose broadly phrased definition had been adopted in earlier decisions, such as *Attorney-General for Quebec v. Reed* (2), per Lord Selborne; *Bank of Toronto v. Lambe* (3), per Lord Hobhouse; and *Brewers' and Maltsters' Association of Ontario v. Attorney-General for Ontario* (4), per Lord Herschell. It was true that the question of the meaning of the words used in ss. 91 and 92 was one, not of political economy but of law. Still, as Lord Hobhouse pointed out, the legislation must have contemplated some tangible dividing line referable to and ascertainable by the general tendencies of the tax and the common understanding of men as to these tendencies. The definition given by John Stuart Mill was accordingly taken as a fair basis for testing the character of the tax in question, not as a legal definition, but as embodying with sufficient accuracy an understanding of the most obvious indicia of direct and indirect taxation, such as might be presumed to have been in the minds of those who passed the Act of 1867. Validity in accordance with such tendencies, and not according to results in isolated or merely particular instances, must be

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(1) [1925] A.C. 561.
(2) 10 App. Cas. 141.

(3) 12 App. Cas. 575.
(4) [1897] A.C. 231.

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the test. The question of validity could not be made to impose on the Courts the duty of separating out individual instances in which the tax might operate directly from those to which the general purview of the taxation applies. An exhaustive partition would be an impracticable task.

Taking the principle so laid down as the guide to the solution of the present question, the result does not seem doubtful. There are two fuel-oil companies which are associated in business in a close fashion. The Union Oil Company of California sells its oil to the Union Company of Canada, which has large storage tanks at Vancouver, which the former company keeps replenished according to directions from the Canadian Company. The respondents purchase oil in British Columbia from the latter company. It is sought to tax them as first purchasers under s. 3, and as holders of the oil for consumption under s. 6, which has to be read with reference to s. 3. It may be true that, having regard to the practice of the respondents, the oil they purchase is used by themselves alone and is not at present resold. But the respondents might develop their business so as to include resale of the oil they have bought. The principle of construction as established is satisfied if this is practicable, and does not for its application depend on the special circumstances of individual cases. Fuel-oil is a marketable commodity, and those who purchase it, even for their own use, acquire the right to take it into the market. It therefore comes within the general principle which determines that the tax is an indirect one.

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p. 939.

Other points were argued against the validity of the Act in question, as, for instance, that it contravened the special provisions of the British North America Act in reference to excise. On these points their Lordships abstain from expressing an opinion. The conclusion at which they have arrived renders it unnecessary to discuss them, and, in accordance with their practice, they accordingly avoid doing so.

Their Lordships agree with the conclusion arrived at by all the Courts below, and they will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for appellant: *Gard, Lyell & Co.*

Solicitors for respondents: *Blake & Redden.*

[PRIVY COUNCIL.]

LUSCAR COLLIERIES, LIMITED.....APPELLANTS;

AND

McDONALD AND OTHERS.....RESPONDENTS.

ATTORNEYS-GENERAL FOR
CANADA AND FOR ALBERTA... } INTERVENERS.J.C.*
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ON APPEAL FROM THE SUPREME COURT OF CANADA.

1927 A.C.
p. 925.

Canada—Railways—Jurisdiction of Railway Board—Branch Line in Province—Railway connecting Provinces—Through Operation of System—Railway Act, 1919 (9 & 10 Geo. 5, c. 68, Dom.), ss. 5, 6—British North America Act, 1867 (30 & 31 Vict. c. 3), s. 92, head 10 (a).

The appellant company owned a short railway line in the Province of Alberta branching from a line which branched from the Canadian Northern Railway at a point within the Province. Both branches were operated by the Canadian Northern Railway Company under agreements, and traffic could pass from the appellants' line without interruption into such other Provinces as were served by that company's railway. The Railway Board made an order declaring its power to grant an application by the first respondent for running rights over the appellants' line, with permission to construct a short track joining it:—

Held, that the Railway Board had power to grant the application, since the appellants' line was part of a system of railways operated together, and connecting one Province with another; it was therefore within the legislative authority of the Dominion under s. 92, head 10(a), of the British North America Act, 1867, and consequently a railway to which by s. 5 of the Railway Act, 1919, that Act applied. It was unnecessary to determine whether the declaration, as to the general advantage of Canada, in s. 6 (c) of the Railway Act, 1919, was a valid declaration under s. 92, head 10(c), of the British North America Act, 1867.

Judgment of the Supreme Court [1925] S.C.R. 460 affirmed.

APPEAL (No. 47 of 1926) by special leave from a judgment of the Supreme Court of Canada (May 18, 1925) affirming a declaratory order of the Board of Railway Commissioners for Canada.

The respondent McDonald, who held a coal lease of property in the vicinity of the appellants' railway line in the Province of Alberta, applied to the Board of Railway Commissioners (hereinafter referred to as "the Railway Board") for an order granting him running powers over the appellants' line, and requiring the Canadian Northern Railway Company (by which the appellants' line was operated) to grant him permission to construct a spur track serving the coal property of which he was lessee.

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p. 926.

* *Present*: VISCOUNT HALDANE, VISCOUNT SUMNER, LORD WRENBURY, LORD DARLING, and LORD WARRINGTON OF CLYFFE.

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The facts and the material statutory provisions appear from the judgment of the Judicial Committee.

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On August 14, 1924, the Railway Board made an order declaring that "in pursuance of the powers conferred by s. 6 (c) of the Railway Act, 1919, the Board has power to make the order applied for." No further order was made, as the appellants had given notice of an appeal to the Supreme Court of Canada.

The Supreme Court gave leave to appeal on certain questions as to the jurisdiction of the Railway Board in the matter.

On May 25, 1925, the Supreme Court (Anglin C.J. and Duff, Mignault, Newcombe and Rinfret JJ.; Idington J. dissenting) affirmed the order. The effect of the judgments appears shortly from the judgment of the Judicial Committee, and the appeal is fully reported at [1925] S.C.R. 460.

1927. July 11, 12. *MacRoberts K.C. (S.-G. for Scotland)* and *S. B. Woods K.C.* for the appellants; *Hon. Geoffrey Lawrence K.C.* for the Attorney-General for Alberta. The appellants' railway was a purely local work constructed and owned by them for their own industrial purposes. It was not within the legislative authority of the Dominion and consequently was not a railway to which, by s. 5 of the Railway Act, 1919, that Act applied. The view of three judges in the Supreme Court that the appellants' line formed part of a railway connecting one Province with another, and was therefore within s. 92, head 10 (a), of the British North America Act, 1867, was based upon an erroneous view of the operating agreements. Apart from that, the wording of head 10 (a), especially taken in conjunction with sub-heads (b) and (c), shows that head 10 (a) refers only to local works which themselves connect two Provinces at their boundaries. Joint operation with a Dominion railway does not bring a railway within the sub-head. [Reference was made to *Montreal City v. Montreal Street Ry.* (1) and *Toronto Corporation v. Bell Telephone Co.* (2)] The declaration contained in s. 6 (c) of the Railway Act, 1919, was not a valid declaration for the purpose of s. 92, head 10 (c), of the British North America Act, 1867. Four of the judges in the Supreme Court were of that opinion. A declaration for the purpose of that sub-head

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(1) [1912] A.C. 333.

(2) [1905] A.C. 52.

must be as to a specific work, either existing or contemplated. Otherwise inconvenience would arise; it might be doubtful whether an undertaking fell within a general declaration of the kind in s. 6 (a) of the Act of 1919. There has been no decision of the Privy Council on the question; it was argued in *Hamilton, Grimsby and Bramsville Ry. v. Attorney-General for Ontario* (1), and was referred to in the judgment as one of great importance. Further, the Railway Board had not jurisdiction under s. 186 of the Railway Act, 1919, as the appellants' line was not constructed pursuant to s. 185; in any case it had not jurisdiction to grant the application in the form in which it was framed.

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O. M. Biggar K.C. and *T. Mathew* for the Attorney-General for Canada, interveners. The appellants' railway was within s. 92, head 10 (a), of the British North America Act, 1867, as it formed part of a railway system, all under one control, which connected the Province with another. It is not material that the appellants' branch was not the property of the Dominion Railway. The sub-head should not be read as if the word "directly" appeared before "connecting." The general declaration in s. 6 (c) of the Railway Act, 1919, was a valid declaration for the purpose of s. 92, head 10 (c), of the British North America Act, 1867. It is convenient and reasonable that all branch lines operated by a Dominion railway should be subject to the powers of the Railway Board. A general declaration such as that in s. 6 (c) is now sanctioned by precedent.

S. B. Woods K.C. replied.

July 28. The judgment of their Lordships was delivered by

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p. 928.

LORD WARRINGTON OF CLYFFE. The appellants, the Luscar Collieries, Ltd., are the owners of a short branch line of railway in the Province of Alberta, constructed by them but operated by the Canadian National Railway Company under certain agreements to be mentioned presently. The question in this appeal is whether the appellants' railway is a railway "within the legislative authority of the Parliament of Canada," and therefore a railway to which the Railway Act, 1919, of Canada applies (Railway Act, 1919, s. 5).

(1) [1916] 2 A.C. 583, 586.

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The facts giving rise to these questions are as follows:—

In the year 1911 the Grand Trunk Pacific Branch Lines Company, under the authority of an Act of 1909 of the Parliament of Canada, constructed a Coal Branch in the Province from a station on the main line of the Grand Trunk Railway to a point at or near Coalspur. This branch line is now part of the Canadian National Railways.

In the year 1911, by an Act of that year, the Branch Lines Company were authorized by the Parliament of Canada to construct another branch from the branch last mentioned to the Mountain Park Coal Company's collieries.

In the year 1912 the Mountain Park Coal Company, Ltd., obtained authority from the Parliament of Alberta to construct, maintain and operate a railway which is either identical with or takes the place of the branch described in the Canadian Act of 1911, and by the same Act of the Parliament of Alberta an agreement set forth in the Schedule to the Act between the Branch Lines Company, the Grand Trunk Company, and the Coal Company was ratified and confirmed, and it was provided that the railway thereby authorized should be operated pursuant to the agreement.

By the said agreement, which is dated January 23, 1912, it was provided in effect that the last mentioned railway should be constructed by and at the expense of the Coal Company, who were to be reimbursed by certain rebates on freight, and that so soon as they had been so reimbursed, the Branch Lines Company were to be the absolute owners of the railway. Provision was also made for the operation of the railway by the Grand Trunk Company.

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p. 929.

In the year 1921 the appellant company, by an Act of the Parliament of Alberta, were authorized to construct the railway in question to connect with the Mountain Park Company's railway and to enter into an agreement for the operation of the railway by the Canadian National Railways which then comprised both the Branch Lines Company and the Grand Trunk Company, and for the ultimate transfer to or acquisition by the Canadian National Railways of the railway.

By an agreement dated May 10, 1921, made between the Branch Lines Company and the Grand Trunk Company, and the Mountain Park Coal Company, supplemental to

the agreement of January 23, 1912, provision was made for the application of the agreement to the railway in question, therein referred to as the Luscar Branch Line, with certain modifications as to the terms of reimbursement, and it was thereby provided that on failure of the coal company to ship over the Luscar Branch Line when constructed the annual quantity of coal therein mentioned, neither the Branch Lines Company nor the Grand Trunk Company should be under any obligation to the coal company to continue the operation of such branch line.

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Ultimately, by an agreement dated April 2, 1923, and made between the Mountain Park Company of the first part, the appellant company of the second part, the Branch Lines Company of the third part, and the Grand Trunk Company of the fourth part, the appellant company agreed to submit the Luscar Branch to the operation of the agreements of January 23, 1912, and May 10, 1921, and agreed that the Branch Lines Company and the Grand Trunk Company should have as regards the Luscar Branch all the rights given to them by the Mountain Park Company under the said agreements with regard to the Mountain Park Branch.

Since the construction of the Luscar Branch Line it has been operated under the agreements aforesaid by the Canadian National Railways, and traffic over it can pass without interruption to such parts of the Dominion as are served by the Canadian National Railways.

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p. 930.

Under these circumstances the respondent, N. S. McDonald, the owner of a coal lease in the vicinity of the appellants' colliery, made an application to the Board of Railway Commissioners constituted under the Railway Act of 1919, for an order granting him running rights over the Luscar Branch and for an order requiring the Canadian National Railway Company to grant him permission to construct a short track to serve his coal lease.

The appellant company objected to this application on the ground that the Board of Railway Commissioners for Canada had no jurisdiction, asserting that their line was a Provincial railway, to which the Dominion Railway Acts had no application.

The Board of Railway Commissioners overruled the appellants' objection, and on August 14, 1924, made a

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formal order declaring that in pursuance of the powers conferred by s. 6 (c) of the Railway Act, 1919, the Board had power to make the order applied for. In view of the then pending appeal to the Supreme Court of Canada, the Board made no operative order, leaving this to be dealt with after the question of jurisdiction should have been settled.

The Attorney-General of Canada intervened in the appeal to support the jurisdiction of the Board, and by an order dated May 18, 1925, the Supreme Court affirmed the order of the Board and dismissed the appeal.

The appellant company thereupon obtained special leave to appeal to His Majesty in Council. The Attorney-General for Canada and the Attorney-General for Alberta intervened to oppose and support the appeal respectively. The respondent McDonald does not appear.

The material statutory provisions are the following:—

By s. 91 of the British North America Act, 1867, it was provided that the exclusive legislative authority of the Parliament of Canada extends to (amongst other subjects thereby enumerated) such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by the Act assigned exclusively to the Legislatures of the Provinces.

1927 A.C.
p. 931.

Sect. 92, so far as it is material, is as follows: "In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say:—. . . . 10. Local works and undertakings other than such as are of the following classes: (a) Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the Province with any other or others of the Provinces or extending beyond the limits of the Province. (c) Such works as, although wholly situate within the Province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the Provinces."

The Railway Act, 1919 (Canada), contains the following material provisions:—

"Section 2 (4). 'Company' where not otherwise stated or implied means 'railway company' unless immedi-

ately preceded by 'any' 'every' or 'all' in which case it means every kind of company which the context will permit of."

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"Section 5. This Act shall, subject as herein provided, apply to all . . . railways . . . within the legislative authority of the Parliament of Canada. . . ."

"Section 6. The provisions of this Act shall without limiting the effect of the last preceding section extend and apply to: . . . (c) Every railway or portion thereof, whether constructed under the authority of the Parliament of Canada or not, now or hereafter owned controlled leased or operated by a company wholly or partly within the legislative authority of the Parliament of Canada whether such ownership control or . . . operation is acquired or exercised by lease agreement or other means whatsoever and whether acquired or exercised under authority of the Parliament of Canada or of the Legislature of any Province or otherwise howsoever; and every railway or portion thereof now or hereafter so owned controlled leased or operated shall be deemed and is hereby declared to be a work for the general advantage of Canada."

On this section it is clear that having regard to the definition in s. 2, sub-s. 4, the word "company" means railway company, and does not include a bank or financial company controlling a railway.

1927 A.C.
p. 932.

The Attorney-General for Canada, in support of the jurisdiction of the Board of Railway Commissioners, relies on two alternative grounds: (1.) That the appellants' railway is, under the circumstances, a railway connecting the Province of Alberta with other Provinces (s. 92, head 10 (a)). (2.) That, if this ground fails, then it is a "work" within s. 92, head 10 (c), by virtue of s. 6 (c), of the Railway Act, 1919, and the declaration therein contained.

Of the judges of the Supreme Court of Canada, three, namely, Anglin C.J. and Duff and Rinfret JJ., decided in favour of the jurisdiction on the first ground, but in reference to the second were of opinion that such a general declaration as that contained in s. 6 (c) was not a declaration within s. 92, head 10 (c), of the British North America Act, 1867; two, namely, Mignault and Newcombe JJ., accepted the second ground and expressed no opinion on the first. Idington J. was for allowing the appeal.

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Their Lordships agree with the opinion of Duff J. that the Mountain Park Railway and the Luscar Branch are, under the circumstances hereinbefore set forth, a part of a continuous system of railways operated together by the Canadian National Railway Company, and connecting the Province of Alberta with other Provinces of the Dominion. It is, in their view, impossible to hold as to any section of that system which does not reach the boundary of a Province that it does not connect that Province with another. If it connects with a line which itself connects with one in another Province, then it would be a link in the chain of connection, and would properly be said to connect the Province in which it is situated with other Provinces.

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p. 933.

In the present case, having regard to the way in which the railway is operated, their Lordships are of opinion that it is in fact a railway connecting the Province of Alberta with others of the Provinces, and therefore falls within s. 92, head 10 (*a*), of the Act of 1867. There is a continuous connection by railway between the point of the Luscar Branch farthest from its junction with the Mountain Park Branch and parts of Canada outside the Province of Alberta. If under the agreements hereinbefore mentioned the Canadian National Railway Company should cease to operate the Luscar Branch, the question whether under such altered circumstances the railway ceases to be within s. 92, head 10 (*a*), may have to be determined, but that question does not now arise.

Their Lordships having thus come to a conclusion against the appeal on the first of the two grounds mentioned above, it is unnecessary for them to express any opinion on the second, and in accordance with their usual practice they think it not desirable to do so. But they wish it distinctly to be understood that so far as they are concerned the question as to the validity of s. 6 (*c*) of the Act of 1919 is to be treated as absolutely open.

Counsel for the appellant company raised a question as to the power of the Board of Railway Commissioners to grant the application in the form in which it was framed. This is not a matter going to the jurisdiction of the Board—a Dominion authority as distinct from a Provincial one—and is one which can and ought to be considered by the

Board when—its general jurisdiction having been established—it is asked to exercise it in the particular case.

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Their Lordships are of opinion that the appeal fails and must be dismissed, but without costs. The respondent McDonald does not appear to ask for costs, and the interveners are not entitled to them. Their Lordships will humbly advise His Majesty accordingly.

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Solicitors for appellants and for the Attorney-General for Alberta: *Blake & Redden*.

Solicitors for the Attorney-General for the Dominion: *Charles Russell & Co.*

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MINISTER OF FINANCE.....APPELLANT;

July 27.

AND

1927 A.C.
p. 193.

SMITH.....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Taxation—Income Tax—“Income”—Profit from illicit Traffic in Liquor—Income War Tax Act, 1917 (7 & 8 Geo. 5, c. 28, Can.), s. 3, sub-s. 1.

Profit arising within Ontario from illicit traffic in liquor there carried on contrary to legislative provisions of the Province is “income” as defined by s. 3, sub-s. 1, of the (Dominion) Income War Tax Act, 1917, and is liable to taxation under that Act.

1927 A.C.
p. 194. Observations of Scrutton L.J. in *Inland Revenue Commissioners v. Von Glehn* [1920] 2 K.B. 553, 572, 573 commented on.

Judgment of the Supreme Court of Canada [1925] S.C.R. 405 reversed.

APPEAL (No. 119 of 1925) from a judgment of the Supreme Court of Canada (May 5, 1925) reversing a judgment of the Exchequer Court (June 2, 1924).

A case stated for the opinion of the Exchequer Court of Canada raised the following question: “Are the profits arising within Ontario from the illicit traffic in liquor therein, contrary to the provisions of the said Provincial legislature in that respect, ‘income’ as defined by s. 3, sub-s. 1, of the Income War Tax Act, 1917, and amendments thereto, and liable to have assessed, levied, and paid thereon the taxes provided in the said Act?”

The Exchequer Court held that the profits in question were “income” and liable to the tax. That decision was reversed by the Supreme Court of Canada by judgments reported at [1925] S.C.R. 405.

1926. June 5. *Clauson K.C.* and *C. F. Elliott* for the appellant.

Pritt for the respondent.

[Reference was made to *Caron v. The King* (1); *Cooper v. Stubbs* (2); *Partridge v. Mallandaine* (3); and to observations of Scrutton L.J. in *Inland Revenue Commissioners v. Von Glehn*. (4)]

*Present: VISCOUNT HALDANE, LORD ATKINSON, LORD DARLING, and LORD JUSTICE WARRINGTON.

(1) [1924] A.C. 999, 1006.

(2) [1925] 2 K.B. 753, 769.

(3) (1886) 18 Q.B.D. 276.

(4) [1920] 2 K.B. 553, 572, 573.

July 22. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. This is an appeal from a judgment of the Supreme Court of Canada which reversed the judgment of the Exchequer Court. The decision of the Exchequer Court, which was that of Audette J., was in answer to a question arising on a special case stated by direction of the Court itself, on an appeal by the respondent under the provisions of the Income War Tax Act, 1917, of the Dominion, as amended by subsequent legislation. This question was raised upon the narrative that the respondent Smith had, during the year 1920, gained certain profits within the Province of Ontario by operations in illicit traffic in liquor contrary to the existing Provincial legislation in that respect. Upon these profits Smith had been assessed for income tax, pursuant to the Income War Tax Act, 1917, and the amendments thereto. The validity of the assessment, in so far as it included the said profits as a basis for computing the tax as assessed, was in dispute. The question for the opinion of the Court was "Are the profits arising within Ontario from the illicit traffic in liquor therein, contrary to the provisions of the said existing Provincial legislation in that respect 'income' as defined by s. 3, sub-s. 1, of the Income War Tax Act, 1917, and amendments thereto, and liable to have assessed, levied and paid thereon and in respect thereof the taxes provided for in the said Act." On this question the Exchequer Court decided that the profit arising from the illicit traffic within Ontario was "income" taxable under the Dominion statutes referred to, and dismissed an appeal brought to it by the respondent Smith.

The power of the Dominion Parliament to tax income is exercised under head 3 of s. 91 of the British North America Act, 1867. This extends to the raising of money by any mode or system of taxation. The Dominion Parliament is in such a matter of taxation quasi sovereign, and it is not open to serious doubt that under s. 91 the Dominion Parliament could tax the profits in question if it thought fit to do so, or that the fact that they arose from operations of traffic in liquor made illicit by the Provincial legislation of a Province constitute no hindrance to such taxation, if the Dominion Parliament had clearly directed it to be imposed. The only real question is one of construction,

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Sect. 3 of the Income War Tax Act, 1917, defines income as including the annual net profit or gain or gratuity being profit from a trade or commercial or financial or other business or calling, directly or indirectly received by a person from any trade, manufacture or business as the case may be, whether derived from sources within Canada or elsewhere, and as including the indirect profits or dividends directly or indirectly received from money at interest upon any security or from stocks, or from any other investment, and whether such gains or profits are divided or distributed or not, and also the profit or gain from any other source. Sect. 4 imposes income tax upon the income so defined of any person carrying on business in Canada. The respondent was engaged during the year 1920 in illicit traffic in liquors in Ontario, contrary to the provisions of the Ontario Temperance Act and the amendments thereto, and the question is whether the Parliament of Canada has enacted that he is to be taxed on the profits from this.

In the Exchequer Court, Audette J. said that trading in liquor is not illicit or illegal at common law, and not *malum in se* but only *malum prohibitum*, and is not a criminal offence. It was, however, illicit and illegal by the laws of Ontario, and the present respondent could not invoke his own turpitude to claim immunity from paying taxes, and ask for discrimination in his favour, increasing the amount which might have to be levied on honest traders. It was not necessary to inquire, he added, into the source from which his revenue was derived, for the tax was by s. 4 of the Taxing Act imposed on the person. The illicit traffic in question was not a criminal offence in itself, and while illegal in Ontario, might not be so in other parts of Canada. The Provincial legislation could not derogate from the right of the Dominion under its Taxing Act, and the profits in question came within the ambit of the definition of income in that Act.

The Supreme Court took a different view. The learned judges of that Court thought that such a business as that of the present respondent ought to be strictly suppressed, and that it would be strange if under the general terms of the Dominion statute the Crown could levy a tax on the proceeds of a business which a Provincial legislature, in

the exercise of its constitutional powers, had prohibited within the Province. They held that the power, given to the Dominion Minister, by s. 7, to call for a return of the taxpayer's income vouched by documents and in detail, and for records which he was to keep, could be construed only as relating to what was legal, and could not extend to gains from crimes. They therefore allowed the appeal. Idington J. added that the "bootleggers," as the profiteers under the Ontario Temperance Act had been called, were well known before the Taxing Act became operative, and that it was to be expected that if it had been intended to apply that Act to them express or very clear language would have been used. The judgment of the Exchequer Court was accordingly reversed, and this appeal is the result.

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Construing the Dominion Act literally, the profits in question, although by the law of the particular Province they are illicit, come within the words employed. Their Lordships can find no valid reason for holding that the words used by the Dominion Parliament were intended to exclude these people, particularly as to do so would be to increase the burden on those throughout Canada whose businesses were lawful. Moreover, it is natural that the intention was to tax on the same principle throughout the whole of Canada, rather than to make the incidence of taxation depend on the varying and divergent laws of the particular Provinces. Nor does it seem to their Lordships a natural construction of the Act to read it as permitting persons who come within its terms to defeat taxation by setting up their own wrong. There is nothing in the Act which points to any intention to curtail the statutory definition of income, and it does not appear appropriate under the circumstances to impart any assumed moral or ethical standard as controlling in a case such as this the literal interpretation of the language employed. There being power in the Dominion Parliament to levy the tax if they thought fit, their Lordships are therefore of opinion that it has levied income tax without reference to the question of Provincial wrongdoing.

There are certain expressions at the end of the judgment of Scrutton L.J. in *Inland Revenue Commissioners v.*

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Von Glehn (1) as to the scope of the British Income Tax Acts. Their Lordships have no reason to differ from the conclusion reached in that case, but they must not be taken to assent to any suggestion sought to be based on the words used by the learned Lord Justice, that Income Tax Acts are necessarily restricted in their application to lawful businesses only. So far as Parliaments with sovereign powers are concerned, they need not be so. The question is never more than one of the words used.

They will humbly advise His Majesty that this appeal should be allowed, the judgment of the Supreme Court set aside with costs and the judgment of the Exchequer Court restored. The respondent will pay the costs of the appeal.

Solicitors for appellant: *Charles Russell & Co.*

Solicitors for respondent: *Blake & Redden.*

(1) [1920] 2 K.B. 553, 572, 573.

[PRIVY COUNCIL.]

ROYAL BANK OF CANADA

AND ANOTHER.....}

APPELLANTS;

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AND

LARUE AND OTHERS.....RESPONDENTS.

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ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Legislative Authority—Bankruptcy—Judicial Hypothec—Civil Code (Quebec), art. 2121—Bankruptcy Act Amendment Act, 1920 (10 & 11 Geo. 5, c. 34, Dom.), s. 6—British North America Act, 1867 (30 & 31 Vict. c. 3), s. 91, head 21.

On the true construction of the Bankruptcy Act of Canada, s. 11, sub-s. 10 (enacted by c. 34 of the Dominion Statutes for 1920, s. 6), a judicial hypothec upon real assets of a debtor, resulting from registration under art. 2121 of the Civil Code of Quebec, was thereby postponed to an authorized assignment subsequently made by the debtor for the benefit of his creditors.

It was within the powers of the Parliament of Canada so to enact, since the legislative power of that Parliament under s. 91, head 21, of the British North America Act, 1867, in relation to "bankruptcy and insolvency," enables it to determine by legislation the relative priorities of creditors under a bankruptcy or authorized assignment; that power prevails over the legislative power of a Province under s. 92, head 2, in relation to property and civil rights in the Province.

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Attorney-General of Ontario v. Attorney-General for Canada [1894] A.C. 189 followed.

Judgment of the Supreme Court [1926] S.C.R. 218 affirmed.

APPEAL (No. 28 of 1926) by special leave from a judgment of the Supreme Court of Canada (February 2, 1926) reversing a judgment of the Court of King's Bench of the Province of Quebec, Appeal Side (June 15, 1925), which affirmed a judgment of the Superior Court.

The Bankruptcy Act of Canada by s. 11, sub-s. 10 (as enacted by s. 6 of the amending Act, c. 34 of 1920), provided that, from and after registration, a receiving order or authorized assignment made in pursuance of the Act "shall have precedence of all certificates of judgments, judgments operating as hypothecs. . . ."

Two questions arose for determination in the appeal—namely, (1.) whether upon the true construction of the

*Present: VISCOUNT CAVE L.C. LORD BUCKMASTER, LORD CARSON, LORD DARLING and LORD WARRINGTON OF CLYFFE.

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above sub-section a judicial hypothec upon real estate of a debtor resulting from the registration of a notice under art. 2121 of the Civil Code of Quebec, was intended to be postponed to a subsequent authorized assignment by the debtor for the benefit of his creditors, and (2.)—if that were the intended effect—whether the sub-section was in that respect within the legislative authority of the Dominion Parliament under the British North America Act, 1867.

The facts and the relevant statutory provisions appear from the judgment of the Judicial Committee.

In the Superior Court, Lemieux C.J. held that the language of s. 11, sub-s. 10, was not apt to include a judicial hypothec in Quebec, and that even if it were, its effect was merely to enable the trustees to dispose of the property, leaving the creditor with a lien upon the proceeds in the distribution of the assets. Further, he was of opinion that if the sub-section purported to deprive the creditor of a preference arising from the judicial hypothec, it was to that extent *ultra vires*.

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On appeal to the Court of King's Bench, Appeal Side, the judgment was unanimously affirmed. The appeal is reported at Q.R. 40 K.B. 561.

An appeal to the Supreme Court of Canada was allowed by Anglin C.J. and Duff, Mignault and Newcombe JJ.; Rinfret J. dissenting. The majority of the Court, in a judgment delivered by Newcombe J., in effect answered both the above stated questions in the affirmative. Rinfret J. agreed with the view in the lower Courts. The appeal is reported at [1926] S.C.R. 218.

The Attorney-General for Quebec intervened before the hearing in the Superior Court, and was an appellant in the present appeal. The Attorney-General for Canada intervened by leave in the present appeal.

1927. Nov. 14, 15, 17. *Sir John Simon K.C., Lanctot K.C. and M. Alexander* for the appellants. For the reasons given in the Courts in Quebec the wording of s. 11, sub-s. 10, is not apt to describe a judicial hypothec under the law of that Province. But even if it is, the enactment has not the effect contended by the respondents. On registration under art. 2121 of the Civil Code the creditor obtains a hypothec which, under art. 1616, is a real right against the property named in the notice; art. 1619 provides that a

hypothec may be legal, judicial, or conventional. That right of the creditor is part of his property and civil rights. The owner of a hypothec is a "secured creditor" within the definition in s. 2 of the Bankruptcy Act, and in that capacity has the rights given by s. 46, amended by s. 38 of the Act of 1921. The true effect of the sub-section is merely to prevent a judgment being enforced by execution, or being perfected by a subsequent registration. The amendments by s. 7 of the Act of 1920, and by s. 5 of the Act of 1925, proceeded upon a misapprehension of the effect of the principal Act. A construction of that Act which assumes that it was not the intention to interfere with property and civil rights in the Province is to be preferred.

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If however s. 11, sub-s. 10, purports to deprive the holder of a registered hypothec of his priority, it is *ultra vires*. The Dominion Parliament has not power under s. 91, head 21, of the British North America Act, 1867, to cancel a security, valid under the law of a Province, however long before a bankruptcy that security was obtained. The power is limited to securities obtained within a strictly limited time before a bankruptcy. Under s. 91, head 21, the Dominion Parliament can interfere with "property and civil rights in the Province," a matter which by s. 92, head 12, is within the exclusive legislative power of the Province, only if the legislation is "necessarily incidental" to the exercise of the power as to "bankruptcy and insolvency": *City of Montreal v. Montreal Street Ry.* (1); *Attorney-General of Ontario v. Attorney-General for Canada.* (2)

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Their Lordships desired to hear further arguments upon the question of *ultra vires* only.

Macmillan K.C. and *T. Mathew* for the Attorney-General for Canada, interveners. The region in which the legislation in question was operating was that of things in the nature of judgments, not of conventional rights. Having regard to the words at the end of s. 91 the power of the Province is excluded in matters coming within "the class" of "bankruptcy and insolvency," not merely in matters "necessary" in dealing with that subject. In legislating as to the distribution of the assets of an insolvent, the rights under charges, liens and hypothecs is a matter within the sphere of the authorized legislation. Some interference

(1) [1912] A.C. 333, 343.

(2) [1894] A.C. 189, 200.

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with civil rights was unavoidable, and did not prevent the legislation from being intra vires: *Cushing v. Dupuy* (1); *Tennant v. Union Bank of Canada* (2); *Attorney-General of Ontario v. Attorney-General for Canada*. (3)

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St. Laurent K.C. and *Horace Douglas* for the respondents. A judicial hypothec in Quebec is not a right apart from the judgment; it is of the nature of an execution rather than of a conventional right. A judicial hypothec is not, however, a perfected execution; it can be enforced only by action, and upon a failure to realize the debt under a writ in execution against the debtor's movables: Civil Procedure Code, arts. 600, 614; Civil Code, arts. 2060, 2061; Pothier, Bugnet's ed., vol. ix., p. 441, § § 66, 67. There were statutes in several Provinces postponing the rights of holders of unsatisfied judgments upon a voluntary assignment by the debtor for the benefit of his creditors. It cannot therefore be contended that that question is not within the sphere of insolvency legislation. The Dominion Legislature was entitled to deal with the matter so as to bring the various Provincial enactments into harmony.

Sir John Simon K.C. replied.

1928. Jan. 19. The judgment of their Lordships was delivered by

VISCOUNT CAVE L.C. The facts leading up to this litigation are undisputed, and may be very shortly stated. On March 25, 1922, the claimant, the Royal Bank of Canada (which will be referred to as "the Bank"), obtained judgment against one Bélanger for \$14,036.44 with interest and costs. On April 6, 1922, the Bank caused this judgment to be registered in the Registration Division of Quebec, and at the same time caused to be registered (in accordance with art. 2121 of the Civil Code of Quebec) a notice describing certain real estate of the debtor situate in that Division, so establishing a judicial hypothec upon that property resulting from the judgment. On April 11, 1922, the Bank registered a second notice describing other real estate of the debtor situate in the same Division, to be also affected by the judgment and the judicial hypothec thereby created. On December 24, 1923—no further steps having in the meantime been taken for enforcing the judgment and

(1) (1880) 5 App. Cas. 409.

(2) [1894] A.C. 31.

(3) [1894] A.C. 189, 200.

hypothec—Bélanger made an authorized assignment for the benefit of his creditors under the Bankruptcy Act of the Dominion (c. 36 of 1919), and the respondents, Larue, Trudel and Picher, were shortly afterwards appointed trustees under the assignment. The assignment and appointment were duly registered. The Bank filed a claim with the trustees, asserting a privilege in the nature of a judicial hypothec upon the real estate of the debtor described in the notices of April 6 and 11, 1922; but the trustees, on the authority of s. 11, sub-s. 10, of the Bankruptcy Act, rejected the claim of privilege except as regards the costs of the judgment. The Bank appealed against this rejection to the Superior Court of Quebec, which allowed the appeal, and declared the Bank entitled to the preference which it claimed; and this decision was affirmed by the Court of King's Bench of Quebec. But, on a further appeal by the trustees to the Supreme Court of Canada, that Court by a majority (consisting of Anglin C.J., and Duff, Mignault and Newcombe JJ.; Rinfret J. dissenting) reversed the decision of the Court of King's Bench and confirmed the disallowance by the trustees of the Bank's claim for privilege. The Bank now appeals to His Majesty in Council.

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The questions at issue between the parties are two in number—namely, (1.) whether on the true construction of the Bankruptcy Acts of the Dominion a judicial hypothec upon real estate of a debtor resulting from the registration of a notice under art. 2121 of the Civil Code of Quebec is intended to be postponed to a subsequent authorized assignment by the debtor for the benefit of his creditors; and (2.) if on the true construction of the Bankruptcy Acts such a hypothec is intended to be so postponed, whether the Acts are in that respect within the legislative authority of the Dominion Parliament under the British North America Act, 1867. It is only if both these questions are answered in the affirmative that the judgment of the Supreme Court of Canada can stand; and it is convenient to deal with them in the above order.

1. The relevant provisions of s. 11 of the Dominion Bankruptcy Act of 1919 as originally enacted were as follows:—

“11. (1.) Every receiving order and every authorised assignment made in pursuance of this Act shall take pre-

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cedence over: (a) all attachments of debts by way of garnishment unless the debt involved has been actually paid over to the garnishing creditor or his agent; and (b) all other attachments, executions or other process against property, except such thereof, as have been completely executed by payment to the execution or other creditor; but shall be subject to a lien for one only bill of costs, including sheriff's fees, which shall be payable to the garnishing attaching or execution creditor who has first attached by way of garnishment or lodged with the sheriff an attachment, execution or other process against property; Provided that this paragraph shall not apply to any execution or other process issued against real or immovable property under or by virtue of a judgment registered prior to the coming into operation of this Act, which judgment, as the result of such registration, became, under the laws of the Province wherein it was entered, a charge, lien or hypothec upon or of such real or immovable property."

"(8.) Every receiving order and every authorised assignment (or a true copy certified as to such order by the registrar or other clerical officer of the court which has made it, and as to such assignment certified by the trustee therein named) shall be registered or filed by or on behalf of the trustee in the proper office in every district, county or territory in which the whole or any part of any real or immovable property which the bankrupt or assignor owns or in which he has any interest or estate is situate."

"(10.) From and after such registration or filing or tender thereof within the proper office to the registrar or other proper officer, such order or assignment shall have precedence of all certificates of judgment, judgments operating as hypothecs, executions and attachments against land (except such thereof as have been completely executed by payment) within such office, or within the district, county or territory which is served by such office, but subject to a lien for the costs of registration and sheriff's fees, of such judgment, execution or attaching creditors as have registered or filed within such proper office their judgments, executions or attachments."

The coming into force of the above Act had been postponed to July 1, 1920, and before it came into force it was amended by c. 34 of the statutes of that year. By s. 6 of the last mentioned statute the proviso to para. (b) of s. 11,

sub-s. 1, which excepted from the application of that paragraph judgments registered prior to the coming into operation of the Act, was repealed, and all judgments, whether registered before or after July 1, 1920, were left to be governed by the general rule. Further, by s. 7 of the same Act of 1920 it was enacted as follows:—

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“7. Section 11 of the said Act is hereby amended by adding thereto the following sub-section: ‘(16.) The provisions of paragraphs one and ten of this section shall not apply to any judgment or certificate of judgment registered against real or immovable property in either of the Provinces of Nova Scotia and New Brunswick prior to the coming into force of this Act, which became, under the laws of the Province wherein it was registered, a charge, lien or hypothec under such real or immovable property.’ ”

In 1925 this sub-s. 16 was amended so as to include judgments registered against real estate in the Province of Quebec prior to the coming into force of the Bankruptcy Act, and this was done by 15 & 16 Geo. 5, c. 31, s. 5, which reads as follows:—

“5. Sub-section (16.) of section 11 of the said Act as that subsection is enacted by section 7 of the chapter 34 of the Statutes of 1920, is hereby repealed and the following is substituted therefor: ‘(16.) The provisions of sub-sections (1.) and (10.) of this section shall not apply to any judgment or certificate of judgment registered against real or immovable property in any of the provinces of Nova Scotia, New Brunswick or Quebec, prior to the coming into force of this Act, which became, under the laws of the Province wherein it was registered, a lien or hypothec upon such real or immovable property.’ ”

Upon a review of these enactments their Lordships are of opinion that they have been correctly interpreted by the Supreme Court as having the effect of postponing a judicial hypothec upon real estate of the debtor to an authorized assignment by the debtor for the benefit of his creditors. Sub-s. 1 of s. 11 of the Act of 1919 gives to an authorized assignment precedence over all executions against property not completed by payment to the execution creditor; and sub-s. 10 carries the process a step further by giving to such an assignment, when duly registered in any district, precedence over all “certificates of judgment, judgments

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operating as hypothecs, executions and attachments against lands (except such thereof as have been completely executed by payment)" within the district. It was stated by the learned judges of the Quebec Courts that the words "certificates of judgment, judgments operating as hypothecs," were unknown in the jurisprudence of that Province, and their Lordships of course accept that statement as showing that the precise phrase used in the statute is new to Quebec; but the Quebec Civil Code speaks (in art. 2020) of a judicial hypothec as "resulting from" a judgment and (in art. 2121) of a judgment as "conferring" a hypothec when registered, and the expression "judgments operating as hypothecs" is a not inapt paraphrase of this language. The view taken by Lemieux C.J. in the Superior Court, that the intention of sub-s. 10 was only to transfer to the trustee of the assignment the power of realizing the property affected by the hypothec, leaving to the hypothecary creditor an effective charge on the proceeds of realization, does not appear to their Lordships to give full effect to the enactment in sub-s. 10, that the assignment is to have precedence over the judgment operating as a hypothec; and their Lordships agree with the opinion of Newcombe J. (who gave the reasons for the judgment of the majority of the Supreme Court), that the intention of these enactments was that the assignment should have precedence of all judgments operating as hypothecs for all purposes, including the distribution as well as the realization of the assets. The suggestion, put forward by counsel for the appellants on this appeal, that the sub-section was intended to give the assignment precedence over the judgment only and not over the hypothec following upon the judgment, appears to their Lordships to have no substance; for if a judgment operating as a hypothec is postponed to the assignment, the hypothec which it operates must surely undergo the same process.

This conclusion, which their Lordships would have been disposed to adopt on a reading of the earlier part of s. 11, sub-s. 10, taken by itself, is confirmed by a consideration of the latter part of that subsection, which reserves to a judgment creditor who has duly registered his judgment a lien on the land for his costs of registration and sheriff's fees; for if the intention of the Legislature had been to leave to the hypothecary creditor his full charge on the land subject to the hypothec, it would have been un-

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necessary to preserve his lien for costs. Further, s. 7, sub-s. 16, of the Act of 1920, which excepted from s. 11, sub-s. 10, of the Act of 1919 any judgment registered against real property in Nova Scotia or New Brunswick before the coming into force of that Act which became under the law of the Province a charge, lien or hypothec against such property, carries a plain implication that such a judgment if registered after the coming into force of the Act of 1919 is intended to be affected by s. 11, sub-s. 10, of the Act. The Act of 1925 above cited was passed after the present dispute arose; but s. 5 of that Act, which extends the operation of s. 7 of the Act of 1920 to Quebec, shows plainly that the Dominion Legislature in 1925 interpreted the Act of 1919 as applying to that Province in the same sense.

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For these reasons, which agree in substance with those given by Newcombe J., on behalf of the majority of the Supreme Court, their Lordships are of opinion that the first of the two questions above set out should be answered in the affirmative.

2. Their Lordships now turn to the second question arising on this appeal—namely whether the enactment of s. 11, sub-s. 10, of the Bankruptcy Act of 1919, as above construed, was within the powers conferred upon the Dominion Parliament by s. 91 of the British North America Act, which entrusts to that Parliament exclusive legislative authority over all matters coming within certain classes of subject there enumerated, including “bankruptcy and insolvency,” or whether it infringes upon the exclusive power given by s. 92 of the same Act to a Provincial Legislature to make laws in respect of “property and civil rights” in the Province.

The expression “bankruptcy and insolvency” in s. 91, head 21, of the British North America Act was referred to by Lord Selborne in *l'Union St. Jacques de Montreal v. Belisle* (1) as “describing in their known legal sense provisions made by law for the administration of the estates of persons who may become bankrupt or insolvent, according to rules and definitions prescribed by law, including of course the conditions in which that law is to be brought into operation, the manner in which it is to be brought

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(1) (1874) L.R. 6 P.C. 31, 36.

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into operation, and the effect of its operation." In *Attorney-General of Ontario v. Attorney-General for Canada* (1), Lord Herschell observed that a system of bankruptcy legislation might frequently require various ancillary provisions for the purpose of preventing the scheme of the Act from being defeated, and added: "It may be necessary for this purpose to deal with the effect of executions and other matters which would otherwise be within the legislative competence of the Provincial Legislature. Their Lordships do not doubt that it would be open to the Dominion Parliament to deal with such matters as part of a bankruptcy law, and the Provincial Legislature would doubtless be then precluded from interfering with this legislation inasmuch as such interference would affect the bankruptcy law of the Dominion Parliament." Taking these observations as affording assistance in the construction of s. 91, head 21, of the Act of 1867, their Lordships are of opinion that the exclusive authority thereby given to the Dominion Parliament to deal with all matters arising within the domain of bankruptcy and insolvency enables that Parliament to determine by legislation the relative priorities of creditors under a bankruptcy or an authorized assignment. A creditor who has obtained judgment for his debt and has issued execution upon the debtor's lands or goods remains a creditor; and it is entirely within the authority of the Dominion Parliament to declare that such a creditor, although (as Newcombe J. expressed it) he has been "first in the race for execution" but has not yet proceeded upon his execution and become satisfied by payment, shall on the occurrence of bankruptcy or a cessio bonorum be reduced to an equality with the general body of creditors. Then is there anything in the nature of a judicial hypothec in the Province of Quebec which exempts it from the possibility of being affected in like manner by the bankruptcy law of the Dominion? In their Lordships' opinion there is nothing in the Quebec law which can have that effect. It is true that judicial hypothec is classed in the Civil Code with legal and conventional hypothecs, and is there said to establish a real right; but notwithstanding these provisions the hypothecary creditor remains a judgment creditor, and his hypothec, whether it may or may not be properly called a mode of execution, is at all

(1) [1894] A.C. 189, 200.

events closely analogous to that process. Indeed their Lordships were informed that art. 614 of the Code of Civil Procedure of Quebec has been held to require such a creditor to cause the movable goods of the debtor to be realized under the judgment before he can enforce his hypothec against the land. There is nothing therefore in the nature of a judicial hypothec which for the purpose now in question distinguishes it from an execution levied upon land, and Lord Herschell's judgment above cited shows clearly that such an execution may lawfully be postponed by Dominion Act.

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The contention that the enactment of s. 11, sub-s. 10, of the Bankruptcy Act infringes the authority of the Provincial Legislature to deal with property and civil rights is effectively dealt with by Newcombe J. No doubt it was within the competence of the Provincial Legislature to give to a judicial hypothec the quality of a real right; but if and so soon as that enactment comes into conflict with a Dominion statute duly passed under the authority of s. 91 of the Act of 1867, then the Dominion statute prevails over the Provincial legislation and takes effect according to its tenor. The decisions of this Board relating to what is sometimes called the "unoccupied field" are referred to in the judgment of Newcombe J., and conclusively establish this point.

The thesis that a postponement or annulment of the rights of creditors who under a Provincial law have obtained preferential rights is within the domain of bankruptcy legislation receives support by reference to a series of Provincial statutes to which Mr. St. Laurent in an able argument called their Lordships' attention. The Assignments and Preferences Act of Ontario (R.S. Ont. 1914, c. 134) enacted (by s. 14) that an assignment for the general benefit of creditors under that Act should take precedence of attachments, garnishee orders, judgments, executions not completely executed by payment and orders appointing receivers by way of equitable execution, subject to a lien for the execution creditor's costs. Similar provisions were contained in the Assignments Act of Manitoba (R.S. Man. 1913, c. 12, s. 8), the Assignments Act of Saskatchewan (R.S. Sask. 1909, c. 142, s. 9), the Creditors' Trust Deeds Act of British Columbia (R.S. B.C. 1911, c. 13, s. 14), the Act of New Brunswick respecting Assignments and

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Preferences by Insolvent Persons (R.S. N.B. 1903, c. 141, s. 9), and (except as to lands) the Assignments Act of Nova Scotia (R.S. N.S. 1923, c. 200, s. 46). In all these cases the Provincial Legislatures when dealing with assignments by insolvents included in their legislation provisions postponing an execution to the general right of an assignee for the benefit of creditors; and it would be difficult to reconcile the course so taken by those Legislatures with the contention that such a postponement is not within the domain of bankruptcy law. It may be added that, since the "unoccupied field" where such priorities are regulated has been occupied by the bankruptcy Acts of the Dominion, most of these Provincial enactments have been repealed.

In the result their Lordships find themselves in agreement upon both questions with the reasoning and conclusions of the majority of the Supreme Court of Canada, and they will humbly advise His Majesty that this appeal fails and should be dismissed. The appellants will pay the costs of the respondent trustees.

Solicitors for appellants: *Blake & Redden.*

Solicitors for respondents: *Lawrence Jones & Co.*

Solicitors for intervener: *Charles Russell & Co.*

[PRIVY COUNCIL.]

HIRSCH AND ANOTHER.....APPELLANTS;

AND

| | | |
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| PROTESTANT BOARD OF SCHOOL COMMISSIONERS OF MONTREAL AND OTHERS..... | } | RESPONDENTS. |
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ON APPEAL FROM THE SUPREME COURT OF CANADA.

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Canada—Legislative Authority—Education—Quebec Educational System—Jews—Protestants—Denominational Schools—24 Vict. c. 15 (Lower Canada)—3 Edw. 7, c. 16 (Queb.)—British North America Act, 1867 (30 & 31 Vict. c. 3), s. 93.

The Quebec Legislature in 1903 passed an Act, 3 Edw. 7, c. 16, which provided that persons professing the Jewish religion should, for school purposes be treated as Protestants and have the same rights and privileges; that their children should have the same right of education as Protestant children; and that school taxes paid by them should go to the support of the Protestant schools.

Under statutes of Lower Canada consolidated in 1861 by 24 Vict. c. 15 there were outside the cities of Quebec and Montreal (the rural area) common schools and dissentient schools, and within those cities Roman Catholic separate schools and Protestant separate schools.

The British North America Act, 1867, by s. 93 conferred on Provincial Legislatures exclusive power to make laws in relation to education, but, by proviso 1 preserved "any right or privilege with respect to denominational schools which any class of persons had by law," and by proviso 2 enacted that privileges conferred by law on separate Roman Catholic schools in Upper Canada should be extended to dissentient schools of Roman Catholics and Protestants in Quebec:—

Held, (1.) That the word "Protestant" in the statutes consolidated in 1861 could not be construed as "non-Catholic," and so as including Jews; and that the Protestant community, though divided for certain purposes into denominations, was itself a denomination and capable of being regarded as "a class of persons" within s. 93, sub-s. 1, of the Act of 1867.

(2.) That having regard to the provisions of the Act of 1861 as to management and control, the dissentient schools in the rural area, and the separate schools in the two cities, had rights and privileges within s. 93, proviso 1; but that the common schools in the rural area had not, as although each school might in fact be controlled by persons of the faith of the majority, that was not a right or privilege which "a class of persons had by law."

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Mather v. Town of Portland (1874), J. C.), Wheeler's Confederation Law of Canada, 338, 367 followed.

(3.) That the Act of 1861 impliedly reserved the right of attendance at dissentient schools in the rural area to children of the religion of the dissentients; in any case proviso 2 to s. 93 of the Act of 1867 had that effect.

* *Present*: VISCOUNT CAVE L.C., VISCOUNT HALDANE, LORD BUCKMASTER, LORD DARLING, and LORD WARRINGTON OF CLYFFE.

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- (4.) That the provisions as to the management and control of separate schools in the two cities gave them a denominational stamp which could not be effaced by the attendance of a certain number of children of a divergent faith.
- City of Winnipeg v. Barrett* [1892] A.C. 445, 453 to 456; *Brophy v. Attorney-General of Manitoba* [1895] A.C. 202, 226, 227; and *Ottawa Separate School Trustees v. Mackell* [1917] A.C. 62, 67 followed.
- (5.) That, consequently, 3 Edw. 7, c. 16 (Queb.), although otherwise *intra vires*, was *ultra vires* so far as it would enable persons professing the Jewish religion to be appointed to the Protestant Board of School Commissioners in the cities of Quebec or Montreal or on any Protestant Board of Examiners, or take part with Protestants in the establishment of a dissentient school outside those cities, and except so far as it would confer the right of attendance at dissentient schools outside those cities upon persons of a religious faith different from that of the dissentient minority.
- (6.) That it would be possible to frame legislation for establishing separate schools for non-Christians without infringing the rights of the two Christian communities, and that legislation so limited would be valid.
- Judgment of the Supreme Court of Canada [1926] S.C.R. 246, in answer to referred questions, varied as to answers 1 and 2a, but otherwise affirmed.

APPEAL (No. 67 of 1926) by special leave from a judgment of the Supreme Court of Canada (February 2, 1926) on appeal from a judgment of the Court of King's Bench of Quebec, Appeal Side (March 11, 1925).

The judgments were in answer to seven questions referred to the Court of King's Bench by the Lieutenant-Governor of Quebec, relating primarily to the effect, and the validity under s. 93 of the British North America Act, 1867, of an Act of the Quebec Legislature of 1903, being 3 Edw. 7, c. 16.

The said Act provided, shortly stated, that Jews should, for school purposes, be treated as Protestants, and have the same rights, privileges and obligations.

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The questions referred, the answers thereto by the Court of King's Bench and the Supreme Court, and the material terms of 3 Edw. 7, c. 16, and of s. 93 of the British North America Act, 1867, appear from the judgment of the Judicial Committee.

The proceedings in the Supreme Court are reported at [1926] S.C.R. 246.

1927. Nov. 29; Dec. 1, 2, 5. *Sir John Simon K.C.*, *St. Laurent K.C.*, *M. Alexander* and *F. Gahan* for the appellants.

G. A. Campbell K.C., *Creelman K.C.* and *Pritt K.C.* for the Protestant Board, respondents.

Perrault K.C. for the Roman Catholic Board, respondents.

Lancot K.C. for the Attorney-General for Quebec respondent.

Horace Douglas for the respondent Schubert.

Laflaur K.C. and *Pritt K.C.* for the Protestant Committee of Public Instruction (Quebec), interveners.

1928. Feb. 2. The judgment of their Lordships was delivered by

VISCOUNT CAVE L.C. This appeal, which raises questions of great importance in relation to public education in the Province of Quebec, had its first origin in the decision of the Superior Court of Quebec in the case of *Pinsler v. Protestant Board of School Commissioners of Montreal*. (1) In that case Davidson J. held, on the construction of the Quebec Education Act of 1899, that a person professing the Jewish faith, not being the owner of real estate inscribed on the Protestant panel for the purposes of the City school tax, could not compel the Protestant School Commissioners to admit his son as of right to a school under their control.

In consequence of this decision the Legislature of the Province passed in the year 1903 an Act (3 Edw. 7, c. 16) which provided as follows:—

"1. Any provision to the contrary notwithstanding, in all the municipalities of the Province, whether governed, as regards schools, by the Education Act or by special laws, or by the Education Act and by special laws, persons professing the Jewish religion shall, for school purposes, be treated in the same manner as Protestants, and, for the said purposes, shall be subject to the same obligations and shall enjoy the same rights and privileges as the latter. . . . 6. After the coming into force of this Act, the children of persons professing the Jewish religion shall have the same right to be educated in the public schools of the Province as Protestant children, and shall be treated in the same manner as Protestants for all school purposes." By the intervening sections (ss. 2 to 5), provision was made for giving to the Protestant school authorities throughout the Province the benefit of school taxes and contributions paid by or in respect of persons professing the Jewish religion.

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This statute was put in force for some years, but eventually—the number of Jewish children attending the Protestant schools in Montreal having greatly increased (it is said to have risen from 2144 in 1903 to 11,974 in 1923)—it was found that the taxes and allowances received by the Protestant Board in respect of Jewish children were considerably less than the cost of educating those children, and a question was raised by the Board as to the validity of the Act of 1903. An Act passed by the Quebec Legislature in 1922 for increasing the subvention out of the school fund to the Protestant Board (12 Geo. 5, c. 44) failed to put an end to the dispute, and on July 21, 1924, the Lieutenant-Governor appointed a Commission, upon which Roman Catholics, Protestants and Jews were equally represented, to inquire into (among other things) the question of the instruction of Jewish children in the Protestant or other schools. The Commission, being divided in opinion as to the validity of the statute of 1903 and other matters, recommended that the Governor of Quebec should submit to the Court of Appeal and (if necessary) to the Privy Council the questions of law which had been raised; and, accordingly, on February 3, 1925, the Lieutenant-Governor in Council submitted to the Court of King's Bench (Appeal Side) the following questions:—

1. Is the Statute of Quebec of 1903 (3 Edw. 7, c. 16) ultra vires?

2. Under the said statute—(a) can persons of Jewish religion be appointed to the Protestant Board of School Commissioners of the City of Montreal? (b) is the Protestant Board of School Commissioners of the City of Montreal obliged to appoint Jewish teachers in their schools should they be attended by children professing the Jewish religion?

3. Can the Provincial Legislature pass legislation providing that persons professing the Jewish religion be appointed—(a) to the Protestant Board of School Commissioners of the City of Montreal; or (b) to the Protestant Committee of Public Instruction; or (c) as advisory members of these bodies?

4. Can the Provincial Legislature pass legislation obliging the Board of School Commissioners of the City of Montreal to appoint teachers professing the Jewish religion in their

schools should they be attended by children professing that religion?

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5. Can the Provincial Legislature pass legislation providing for the appointment of persons professing the Jewish religion on the proposed Metropolitan Financial Commission outlined in the project submitted by Messrs. Hirsch and Cohen?

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6. Can the Provincial Legislature pass legislation to establish separate schools for persons who are neither Catholics nor Protestants?

7. Assuming the Act of 1903 to be unconstitutional, have the Protestants the right under the present state of the Quebec law to allow children professing the Jewish religion to attend the schools—(a) as a matter of grace; (b) as of right? (c) can the Province force the Protestants to accept children professing the Jewish religion under such conditions?

An Act passed by the Quebec Legislature on April 3, 1925 (15 Geo. 5, c. 19), authorized an appeal as to the matters so submitted from the Court of King's Bench to the Supreme Court of Canada, and from that Court (subject to leave being obtained) to His Majesty in Council.

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The Court of King's Bench (Appeal Side), subject to certain reservations and dissents which it is not necessary to set out in detail, answered the above questions numbered 1, 2 (a), and 7 (a) and (b) in the affirmative, and the remaining questions in the negative; but on appeal by the present appellants (being two of the Jewish members of the Commission above referred to) to the Supreme Court of Canada, that Court (consisting of Anglin C.J., and Mignault, Newcombe, Rinfret, and McLean JJ.) agreed upon the following answers:—

Question No. 1.—Answer: No, except in so far as it would confer the right of attendance at dissentient schools upon persons of a religious faith different from that of the dissentient minority.

Question No. 2.—Answers: To part (a), No. To part (b), No.

Question No. 3.—Answers: To part (a), No. To part (b), This Committee is the creature of post-Union legislation, and, therefore, its personnel is subject to Provincial legis-

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lative control; but, as it is presently constituted, only Protestants are eligible for appointment to it. To part (c). This question can be answered only when the powers and duties of such advisory members shall have been defined.

Question No. 4.—Answer: No.

Question No. 5.—Answer: No.

Question No. 6.—Answer: Yes. Such legislation would not necessarily interfere prejudicially with rights and privileges enjoyed either by Roman Catholics or Protestants as a class at the Union. Such interference, of course, could not be allowed.

Question No. 7.—Answer: It is impossible to answer this question categorically and difficult to answer it intelligently. We deal with it as follows:—We assume that the question is to be answered having regard to the law of the Province of Quebec bearing on educational matters, in so far as such law is valid, exclusive of the Act of 1903, and that “Protestants” in the question means the Protestant Board of School Commissioners of the City of Montreal and the Trustees of the Protestant dissentient schools in rural municipalities.

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To part (a) the answer is: Yes.

To part (b). Further, assuming that the inquiry intended is whether Jewish children have the right to attend Protestant schools, with a correlative obligation on the part of the Boards of Protestant School Commissioners and Trustees to admit children professing the Jewish religion to the schools respectively under their control and to provide therein for their education, the answer is:—In the City of Montreal: Yes. In the rural municipalities: No.

To part (c). The words “Under such conditions” are quite unintelligible. It is impossible to discern what conditions are meant to be imparted. Eliminating them from the question, the answer is:—In the City of Montreal: Yes. In the rural municipalities: No.

The appellants have obtained special leave to appeal from this decision to His Majesty in Council.

The solution of the main question to be determined on this appeal—namely, the question whether the Quebec statute of 1903 above referred to is or is not ultra vires,

depends upon the effect to be given to s. 93 of the British North America Act of 1867, which provides as follows:—

93. In and for each Province the Legislature may exclusively make laws in relation to education, subject and according to the following provisions:—(1.) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the Province at the Union; (2.) All the powers, privileges and duties at the Union by law conferred and imposed in Upper Canada on the separate schools and school trustees of the Queen's Roman Catholic subjects shall be and the same are hereby extended to the dissentient schools of the Queen's Protestant and Roman Catholic subjects in Quebec.

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The succeeding two paragraphs of the section provide for an appeal to the Governor-General in Council from any act or decision of any Provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the King's subjects in relation to education; but it was not contended before this Board that these provisions—which were the subject of discussion in a Manitoba case (*Brophy v. Attorney-General of Manitoba* (1)), had the effect of ousting the jurisdiction of the Courts, and it is unnecessary to refer to them again.

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In order to determine whether the restrictions imposed by s. 93 of the Act of 1867 are infringed by the Quebec statute of 1903, it is necessary to consider, first, whether any and which of the schools referred to in that statute were denominational schools in which any class of persons had by law any right or privilege at the Union, and, secondly, whether and to what extent that statute prejudicially affects any such right or privilege. For the purpose of this inquiry it is not necessary to recite the earlier statutes of Lower Canada dealing with public education, which are effectively summarized in the judgment of Flynn J. in this case, and it will be sufficient to state shortly the provisions of the consolidating statute of 1861 (24 Vict. c. 15), which was in force at the date of the Union.

The effect of the statute of 1861 was to establish two somewhat different educational systems—namely, one

(1) [1895] A.C. 202.

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system for Lower Canada outside the cities of Quebec and Montreal (which may be referred to as the "rural area") and another system for those two cities.

In the rural area there were set up two classes of school for the elementary instruction of youth, that is to say, (a) in each municipality, one or more common schools managed by School Commissioners elected by all the landholders and householders of the municipality other than the dissentient inhabitants to be hereafter referred to, and (b) in any municipality in which any number of inhabitants professing a religious faith different from that of the majority had signified such dissent, one or more schools managed by Trustees appointed by the dissentients. These schools were maintained partly by monthly school fees, partly by allowances out of the common school fund, and partly by a school rate levied by the School Commissioners, or, in the case of dissentients, by their Trustees. The teachers at each school were appointed by the Commissioners or Trustees in charge of the school, having first been examined by a Board of Examiners for the county, which might (if the Governor in Council so ordained) be organized in two divisions, one Roman Catholic and the other Protestant. The course of study to be followed in each school was regulated by the Commissioners or Trustees (as the case might be), but it was provided (by s. 65 of the Act) that "the curé, priest or officiating minister shall have the exclusive right of selecting the books having reference to religion and morals for the use of the schools for children of his own religious faith." The schools in each municipality were to be visited periodically by Visitors consisting of the resident clergy and other official persons; but no priest, minister or ecclesiastic was to visit a school belonging to inhabitants not of his own persuasion except with the consent of the Commissioners or Trustees of the school (s. 121). Children from 5 to 16 years of age residing in any school district were to have a right to attend "the school thereof" upon payment of the monthly fees (s. 66); but this provision does not appear to have applied to the dissentient schools, which were reserved (except as a matter of favour) for children of the dissentient faith residing in the district and (if there was room) for children from other school districts "of the same faith as the dissentients for whom the school was established" (s. 56).

This reservation, though not clearly stated in the Act, appears to be deducible from its terms; and if there be any doubt upon the point, it is removed by para. 2 of s. 93 of the British North America Act, which extends to dissentient schools in Quebec all the powers and privileges by law conferred on the Roman Catholic schools of Upper Canada, including the provisions of the Upper Canada Act of 1863 (26 Vict. c. 5).

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It is convenient at this stage to deal, as regards these schools in the rural area, with the first of the two questions above formulated, namely, whether any and which of them were denominational schools in which any class of persons had by law any right or privilege at the Union. That the dissentient schools in the rural area fall within that category can hardly be doubted. Where a school is founded by a body of Protestants and is maintained by their contributions and managed by Trustees appointed by them, where its teachers are chosen by those Trustees after examination by a Protestant Board of Examiners, where its religious books are selected by the Protestant minister and admission to the school is confined (except by favour) to the children of Protestant parents, it would be affectation to call that school anything but a denominational school; and the same is equally true of a like dissentient school under Roman Catholic control. It is plain also that the dissentient supporters of such a school, who are bound together by a common religious faith, form a "class of persons" having special rights and privileges with respect to the school, including the right to appoint the managing Trustees and through those Trustees to select the teachers at the school, to control the course of study and to exclude children of another faith. But the same cannot (their Lordships think) be said of a common school in the rural area not being a separate or dissentient school. Such a school, if in a single school district, is under the management of Commissioners appointed by the whole body of landholders and householders in the district without regard to their religious faith; and even in a district where a minority has established its own separate school, the electors who remain need not be all of the same religious persuasion. No doubt it is true, as stated by the Canadian Courts, that in most of the school districts in the rural area the majority of the landholders and householders are

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Roman Catholics, and, accordingly, that the common schools in those districts (other than the dissentient schools) are in fact controlled by members of that religious community; but, if so, the result is due to the circumstances of the particular school districts, and it is not a right or privilege to which any class of persons are "by law" entitled.

In a New Brunswick case (*Maher v. Town of Portland* (1)), James L.J., who delivered the judgment of this Board, dealt with a similar contention as follows: "It has been contended on the part of the appellant that de facto they became denominational schools in this way—that is to say, that whereas the whole machinery was left local, that the ratepayers had the power of appointing the master, the ratepayers had the power of appointing the Trustees of the schools, but where the whole inhabitants of a district or the great majority of a district belonged to the Roman Catholic faith or belonged to a Protestant sect, there they could so work the school practically as to give it a denominational character or a denominational hue; that is to say, if all the children were Roman Catholics, Roman Catholic teaching would be found in that school. But the fact that that might be the accidental result of the mode of working the Act under the old system is not to give a legal right to that denomination, which was the right alone which was intended to be protected by the Federation Act of the Dominion of Canada. It is an accident which might have happened to-day, and might have been reversed to-morrow by a change of the inhabitants of the district or a change in their views; and that is not a thing to which it is possible to give the colour of a legal right." It appears to their Lordships that this reasoning, although relating to a different statute, applies to the common schools (other than dissentient schools) in the rural area, and accordingly that as regards that area the separate or dissentient schools alone come within the protection of s. 93 (proviso 1) of the Act of 1867.

Turning now to the cities of Quebec and Montreal, it appears that, while the public educational system established in those cities by the Act of 1867 was similar in many of its features to that of the rural area, there were important

(1) [1874.] Wheeler's Confederation Law of Canada, 338, 367.

differences. It may be (as suggested by Rivard J.) that it appeared to the Legislature that in these centres, where there was already a dense population and a mixture of religious beliefs, it was unnecessary to require a minority to declare its dissent, and that two kinds of school should at once be set up. But, however that may be, the statute, so far as it applied to the two cities, did not divide the schools into majority and minority schools, but into Roman Catholic and Protestant schools. Each city was to be considered for the purposes of the Act as one municipality, and each school was to be considered a school district. In each city the schools were to be managed by twelve School Commissioners appointed by the Corporation, of whom six were to be Roman Catholic and six Protestant; and such Commissioners were to "form two separate and distinct corporations, the one for Roman Catholics and the other for Protestants" (s. 130). No special school rate was to be levied, but payments were to be made by the City Treasurer to the respective Boards of Commissioners "in proportion to the population of the religious persuasion represented by such Boards respectively" (s. 131). Each Board was to manage its own schools and appoint the teachers; but such teachers were to be previously examined by a Board of Examiners appointed by the Governor in Council through the Superintendent of Education, one-half of such Board being Roman Catholics and the other half Protestants, and each of such halves acting separately from the other (s. 103). The provisions of s. 65 as to the choice of books having reference to religion and morals apparently applied to the City schools, so that the religious books for Roman Catholic schools would be chosen by the Roman Catholic curé or priest and the religious books for the Protestant schools by the Protestant priest or minister. Any school managed by either Board could be attended by any child in the city of the specified age (ss. 66, 128 and 129).

Then, were the common schools in the cities of Montreal and Quebec denominational schools in which any class of persons had by law a right or privilege at the Union? In their Lordships' opinion they were. Every common school in either city was under the management and control of a Board of Commissioners chosen from persons of a particular religious faith, and each of these Boards is

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referred to (in s. 131) as “representing” a religious persuasion. The school fund contributed by the corporation was to be apportioned between the two Boards in proportion to the religious persuasions which they respectively represented, and therefore roughly (although not precisely) according to the religious faiths of those who contributed to the fund. The examination of teachers, the selection of religious books, and the right to visit the schools were based on a like separation of faiths. It is true that in the two cities a school belonging to either Board might before the date of Confederation be attended by children of a faith different from that represented by the Board; but it appears to their Lordships that the provisions for the management and control of the schools by persons of a particular religious persuasion set upon them a denominational stamp which could not be effaced by the attendance of a certain number of children of a divergent faith. The Roman Catholics in Montreal or Quebec formed a class of persons who had the right and privilege of having their schools controlled and managed by Commissioners of that religious persuasion and their teachers examined by Examiners of the same persuasion; and like privileges belonged to the Protestants of each city with regard to the schools controlled by the Protestant Board of Commissioners. This view is confirmed, not only by expressions contained in the judgments of this Board in the Manitoba cases (*City of Winnipeg v. Barrett* (1); *Brophy v. Attorney-General of Manitoba* (2); and in the Ottawa case (*Ottawa Separate School Trustees v. Mackell* (3)), but also by the emphatic statements of the experienced judges who dealt with this matter in the Canadian Courts. Anglin C.J., in delivering the unanimous judgment of the Supreme Court of Canada, said that “under the Act of 1861 there were no dissentient schools either in Montreal or Quebec, although no doubt the schools in those cities were denominational schools,” and, again, that “nobody doubted that the Roman Catholic and Protestant separate schools of Quebec and Montreal were denominational schools or that the Protestants were

(1) [1892] A.C. 445, 453 to 456.

(2) [1895] A.C. 202, 226, 227.

(3) [1917] A.C. 62, 69.

a class of persons whose rights and interests were protected"; and similar expressions may be found in the judgments delivered in the Court of King's Bench. Their Lordships cannot but assent to the views so expressed.

It may be added that, in their Lordships' opinion, the contention, put forward by counsel for the appellants, that the word "Protestant" in the statutes must be construed as meaning non-Catholic and so as including Jews, is quite untenable; and also that the Protestant community, although divided for some purposes into different denominations, is itself a denomination and capable of being regarded as a "class of persons" within the meaning of s. 93 of the Act of 1867.

It appears that the boundaries of the cities of Montreal and Quebec have since the Union been extended, and that the Roman Catholic and Protestant Boards of Commissioners have carried their operations into the added areas. The Supreme Court refrained from pronouncing an opinion as to the effect of any such annexation on school rights in the annexed territories, and their Lordships accordingly do not deal with that question; but it is clear that no post-Union annexation of territory could deprive any class of person of the protection afforded to them by s. 93 of the Act of 1867.

It is now possible to deal with the second of the questions formulated above, namely, whether and to what extent the Quebec statute of 1903 prejudicially affects any right or privilege to which any class of persons was by law entitled at the Union. Sect. 1 of the Act provides that "any provision to the contrary notwithstanding, in all the municipalities of the Province . . . persons professing the Jewish religion shall for school purposes be treated in the same manner as Protestants and for the said purposes shall be subject to the same obligations and shall enjoy the same rights and privileges as the latter." This is very wide and comprehensive language, and, notwithstanding the forcible reasoning of Anglin C.J. to the contrary, their Lordships incline to the view that it would authorize the appointment of professing Jews to the Protestant Boards of Commissioners and Examiners in Montreal or Quebec, and might even justify a claim on the part of Jewish inhabitants in the rural area to join with Protestants in forming a dissentient school and appointing its Trustees. If so, the

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section plainly infringes the rights and privileges of Protestants in the Protestant schools in the city areas and in the dissentient schools elsewhere. Further, s. 6 of the Act, so far as it purports to enable a professing Jew to send his children as of right to a Protestant dissentient school in the rural area, is an infringement of the rights belonging to Protestants at the Union and so goes beyond the legislative authority of the Provincial Legislature. With regard to ss. 2 to 5 of the Act, while they may no doubt require consideration by the Quebec Legislature in view of the decision in the present case, their Lordships agree with the view taken by the Supreme Court that they are not in themselves void as infringing s. 93 of the Act of 1867.

For the above reasons their Lordships are of opinion that the answers to questions 1 and 2 (*a*) should be varied so as to run as follows:—

QUESTION 1. No, except so far as it would enable persons professing the Jewish religion to be appointed to the Protestant Board of School Commissioners in the City of Quebec or Montreal or to any Protestant Board of Examiners or to take part with Protestants in the establishment of a dissentient school outside those cities, and except so far as it would confer the right of attendance at dissentient schools outside the cities of Quebec and Montreal upon persons of religious faith different from that of the dissentient minority.

QUESTION 2 (*a*). On the construction of the statute, yes.

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The above observations enable their Lordships to deal shortly with the questions numbered 2 (*b*), 3, 4, 5 and 7; and it is sufficient to say that they agree with the answers to those questions given by the Supreme Court.

There remains for consideration the sixth question, which asks whether the Provincial Legislature can pass legislation to establish separate schools for persons who are neither Catholics nor Protestants. This question is framed in very general terms, and their Lordships have from time to time expressed their reluctance to give an opinion upon abstract and hypothetical questions which have not yet arisen in a concrete form; but the question now under consideration bears so close a relation to those which have been already dealt with that it would be difficult to arrive at a conclusion as to those other questions without forming

an opinion upon the subject-matter of the sixth question, and their Lordships think it right to say that upon this question also they are in accord with the opinion expressed by the Supreme Court of Canada. While s. 93 of the Act of 1867 protects every right or privilege with respect to denominational schools which any class of persons may have had by law at the Union, it does not purport to stereotype the educational system of the Province as then existing. On the contrary, it expressly authorizes the Provincial Legislature to make laws in regard to education subject only to the provisions of the section; and it is difficult to see how the Legislature can effectively exercise the power so entrusted to it unless it is to have a large measure of freedom to meet new circumstances and needs as they arise. The statute protects the rights which at the Union belonged to the Roman Catholic population as a class, as well as those belonging to the Protestant population as a class; but to treat members of both denominations, who substantially made up the whole population of the Province at the time of the Union, as forming together a "class of persons" with a right to object to the establishment of any school not under Christian control, would be to give a meaning to the statute which its words will not bear. It appears to their Lordships that it would be possible to frame legislation for establishing separate schools for non-Christians without infringing the rights of the two Christian communities in their denominational schools; and they agree with the Supreme Court that legislation confined within those lines would be valid. It is hardly necessary to add that this Board, like the Supreme Court, have dealt with all the questions as questions of law and have in no way concerned themselves with any question of policy.

For the above reasons their Lordships are of the opinion that the decision of the Supreme Court of Canada should be affirmed with the variations above set out, and they will humbly advise His Majesty accordingly. The appellants should pay the costs of the respondent Boards of School Commissioners and of the respondent Joseph Schubert of this appeal. The Protestant Committee of the Council of Public Instruction for Quebec, who obtained special

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leave to intervene before this Board, and the Attorney-General of Quebec should bear their own costs; but the sum of 150*l.* deposited by the Protestant Committee should be returned to them.

Solicitors for appellants, and for the Attorney-General for Quebec: *Blake & Redden.*

Solicitors for respondents and interveners: *Lawrence Jones & Co.*

[PRIVY COUNCIL.]

CITY OF HALIFAX.....APPELLANT;

AND

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AND ANOTHER.....}

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ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Legislative Power of Province—Taxation—"Business tax"—Direct Taxation—Municipal Tax on Property—Ultimate Incidence—Premises occupied by Crown—British North America Act, 1867 (30 & 31 Vict. c. 3), s. 92, head 2; s. 125.

A city charter, enacted by the Legislature of the Province of Nova Scotia, imposed a tax called a "business tax," to be paid by every occupier of real property for the purposes of any trade, profession, or other calling carried on for the purposes of gain; the tax was assessable according to the capital value of the premises. Sect. 394 of the charter provided that any property let to the Crown, or to any person, corporation, or association exempt from taxation, was to be deemed for business purposes to be in the occupation of the owner, and was to be assessed for business tax according to the purposes for which it was occupied.

The respondent estate owned premises which it let to the Crown, represented by the Minister of Railways, for use as a ticket office of the Canadian Northern Railway, the lessee agreeing to pay the business tax. The premises were used exclusively for the purpose above stated. The city assessed the respondent estate to the business tax under s. 394 of the charter:—

Held, that the tax imposed by s. 394, being a tax upon property, was "direct taxation" within the meaning of s. 92, head 2, of the British North America Act, 1867, even though the owner probably would seek to pass it on to the tenant.

The ultimate incidence of a tax should not be applied as a test so as to disturb classifications, well established at confederation, whereby taxes on property or income were classed as direct taxes, while customs or excise duties on commodities were classed as indirect taxes.

Held, further, (1.) that the premises were not excluded from assessment to the business tax on the ground that occupation by the Crown could not be held to be for the purposes of gain; (2.) that the premises were not exempt from taxation by s. 125 of the Act of 1867 as being property belonging to the Crown.

Cotton v. The King [1914] A.C. 176 distinguished.

City of Montreal v. Attorney-General for Canada [1923] A.C. 136 followed.

Judgment of the Supreme Court of Canada [1926] S.C.R. 349 reversed.

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APPEAL (No. 79 of 1926) by special leave from a judgment of the Supreme Court of Canada (February 8, 1926) reversing a judgment of the Supreme Court of Nova Scotia

* *Present*: VISCOUNT CAVE L.C., VISCOUNT HALDANE, LORD WRENBURY, LORD DARLING, and LORD WARRINGTON OF CLYFFE.

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(January 17, 1925) which, on an equal division of opinion, affirmed a judgment of a single judge of that Court.

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The respondent estate owned premises in Halifax, Nova Scotia, which it let to the Crown, represented by the Minister of Railways and Canals of Canada, by a lease dated March 22, 1922. The lease provided that the premises should be used and occupied only for the purpose of a ticket office of the Canadian Northern Railway; also, that the lessee should pay "the business tax, if any," and the respondent estate all other taxes on the premises. The premises were used solely for the purpose above mentioned.

The assessor for the City of Halifax assessed the respondent estate in respect of the premises for business tax for the year ending April 30, 1925. The assessment was made under the city charter, which was enacted by c. 79 of 1919 of the Nova Scotia statutes, as amended by c. 86 of 1920, and c. 77 and c. 78 of 1921.

The effect of the material provisions of the charter appears from the judgment of the Judicial Committee. Stated shortly, the business tax (which was based upon the capital value of the premises) was payable by the occupier, but by s. 394, where the occupier was the Crown, or any person, corporation, or association exempt from taxation, the owner was to be deemed to be the occupier.

The respondent estate appealed from the assessment to the Court of Tax Appeals, which confirmed the assessment, but stated a case for the opinion of a judge of the Supreme Court of Nova Scotia. The questions submitted were: (1.) Whether the said estate of James P. Fairbanks is legally liable for the payment of the said business tax; (2.) whether s. 394 of the Halifax city charter is intra vires the legislation of the Province of Nova Scotia; (3.) whether the said Court of Tax Appeals was right in dismissing the said appeal and confirming the said assessment.

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The Attorney-General for Canada, the second respondent to the present appeal, intervened.

The trial judge answered all the questions submitted adversely to the respondent estate, and his decision was affirmed by the Supreme Court of Nova Scotia, in banco, upon an equal division of judicial opinion.

Upon an appeal to the Supreme Court of Canada the decision was reversed, the Court (Duff J. dissenting) holding that the tax was not "direct taxation" within the meaning of s. 92, head 2, of the British North America Act, 1867, and that consequently its imposition was ultra vires the Legislature of the Province. The reasons of the majority of the Court, which were delivered by Newcombe J., and of Duff, J., in dissenting, appear from the judgment of the Judicial Committee. The appeal is reported at [1926] S. C. R. 349.

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1927. July 7, 8. *F. H. Bell K.C.* and *W. Gordon Brown* for the appellants. The tax imposed by s. 394 of the charter is "direct taxation" within the meaning of s. 92, head 2, of the British North America Act, 1867. This case is the exact converse of *City of Montreal v. Attorney-General for Canada* (1), and the reasoning in that case applies. The tax was an additional tax on the owners of property used for business, assessed according to the value of the property. It was no more an indirect tax on the occupier than is the real property tax imposed by s. 383 of the charter. The ultimate incidence of a local rate of this character is a subject of such doubt and difficulty, that it cannot be assumed that the Legislature when imposing the tax expected or intended that it would be passed on to the tenant. In the absence of that expectation or intention the tax is a direct tax within the definition of Mill adopted in decisions of the Privy Council. In *Cotton v. The King* (2), and other cases in which upon an application of the definitions it was held that the tax was indirect, the expectation and intention appeared from the nature of the tax itself, in the present case it is based solely upon a theory as to which economists differ. There is no authority for the proposition laid down by two of the judges in the Supreme Court of Nova Scotia, that the Crown cannot trade. The property was clearly not the property of Canada, and so exempt under s. 125 of the Act of 1867.

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J. C. Rand K.C. and *Pritt K.C.* for the respondents. The rule based upon Mill's definitions of a "direct tax" and an "indirect tax" is well established, and its application has not been confined to taxes on commodities: *Cotton v. The King*. (2) The tax was one imposed in particular cases

(1) [1923] A.C. 136.

(2) [1914] A.C. 176.

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on the landlord in respect of the user by the tenant, and that gave rise to the inference that it was intended that it should be passed on to the tenant in the form of rent or otherwise. *City of Montreal v. Attorney-General for Canada* (1) is distinguishable, as in the present case the interest taxed was the interest of occupation while the tax was payable by the landlord. The business tax was not assessable under the charter, the Crown could not be held to be carrying on a calling for the purposes of gain. Further, the taxation was upon property of the Crown, and therefore was void under s. 125 of the Act of 1925.

Oct. 18. The judgment of their Lordships was delivered by

VISCOUNT CAVE L.C. The substantial question raised in this appeal is whether a tax imposed by the City of Halifax on the estate of John P. Fairbanks as the owner of certain premises in the city is valid, or whether (as the Supreme Court of Canada has held) it is void as not being "direct taxation" within the meaning of s. 92, head 2, of the British North America Act.

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p. 121. The City of Halifax levies under its charter three taxes called respectively a business tax, a household tax and a real property tax. The business tax is payable by every person occupying real property for the purpose of any trade, profession or calling for purposes of gain, and is assessed on 50 per cent. of the capital value of such property. The household tax is payable by every occupier of any real property for residential purposes, and is assessed on 10 per cent. of the capital value of such property. The real property tax is a tax on the owners of all real property and is assessed on its capital value. By s. 391 of the charter real property which is the property of His Majesty used for Imperial Dominion or Provincial purposes, or which is used for certain charitable and other public purposes there described, is exempt from real property tax. By s. 392 no household tax or business tax is to be paid by the occupiers of any of the properties declared exempt from real property tax if such occupiers are the owners or lessees thereof and are occupying the same solely for the purposes of the association or other body specified as entitled to exemption. By s. 394 it is enacted that property let to the Crown or

to any person, corporation or association exempt from taxation, shall be deemed to be in the occupation of the owner thereof for business or residential purposes, as the case may be, and he shall be assessed and rated for household tax or business tax according to the purpose for which it is occupied.

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The respondent estate is the owner of certain ground floor premises in the city and has let them to His Majesty the King, represented by the Minister of Railways and Canals of Canada, for a term of years, the lease providing that the demised premises shall only be used as a ticket office of the Canadian National Railways, and that the lessee shall pay the business taxes, if any; and the property is in fact used as a ticket office. The respondent estate, having been assessed and rated to business tax in respect of these premises, appealed to the Court of Tax Appeals for the City of Halifax, which confirmed the assessment, and the decision was affirmed by the Supreme Court of Nova Scotia; but on a further appeal to the Supreme Court of Canada that Court (by a majority) set aside the decision of the Courts in Nova Scotia, and held the tax to be ultra vires and void. Hence the present appeal.

In the course of the argument for the respondent estate it was suggested that an occupation by the Crown cannot be held to be for purposes of gain, and accordingly that the premises in question were not assessable to the business tax; but in their Lordships' view there is no substance in this argument. A business is undoubtedly carried on upon the premises, though on behalf of the Crown, and they are therefore within the ambit of the tax. It was also urged that the tax in dispute is a tax on property belonging to Canada, and so is void under s. 125 of the British North America Act; but their Lordships do not consider that a tax on the owner of premises let to the Crown in right of the Dominion can be held to be a tax on the property of Canada. The real and substantial question to be decided is whether the tax is a direct tax falling within the authority of s. 92, head 2, of the British North America Act, or whether it is an indirect tax and so beyond the powers of the Province under that section; and it was because the Supreme Court held the tax to be indirect that they declared the respondent not legally liable for payment.

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The reasons for the decision of the majority of the Supreme Court of Canada were stated by Newcombe J. in a lucid judgment, in the course of which he relied upon the often quoted statement of John Stuart Mill (*Political Economy*, ed. 1886, vol. ii., p. 415), that "a direct tax is one which is demanded from the very persons who it is intended or desired should pay it," while "indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another." The learned judge held that such an expectation or intention might be inferred from the form in which the tax is imposed, or from the results which in the ordinary course of business transactions must be held to have been contemplated; and he expressed the opinion that in the present case, where the owner is made liable for a tax which is imposed in respect of the purposes for which the tenant occupies the premises, it was only to be expected that the landlord would exact indemnity from the tenant. He held, therefore, that the tax was an indirect tax upon the tenant and beyond the powers of the Provincial Legislature. On the other hand, Duff J., who dissented from the judgment of the Court, called attention to the great difficulty of determining the actual incidence of local rates on occupiers, building owners and land owners; and he quoted the opinion of Professor Seligman (*Income Tax*, 1914), that the incidence of such rates in an urban district is determined by a great variety of factors depending on the demand for houses or business premises and the general state of trade. He declined therefore to act upon any general theory as to such incidence, and held the tax to be direct.

In considering the question so raised it is, their Lordships think, important to bear in mind that the problem to be solved is one of law, the answer to which depends upon a true understanding of the meaning of the expression "direct taxation within the Province" as used in the British North America Act. In this connection some observations made by Lord Hobhouse in delivering the judgment of this Board in *Bank of Toronto v. Lambe* (1) are of value. The tax there in question was a tax imposed upon banks and insurance companies carrying on business within the Province of Quebec, and Lord Hobhouse dealt with the

(1) (1887) 12 App. Cas. 575, 581.

point as follows: "First, is the tax a direct tax? For the argument of this question the opinions of a great many writers on political economy have been cited, and it is quite proper, or rather necessary, to have careful regard to such opinions, as has been said in previous cases before this Board. But it must not be forgotten that the question is a legal one, viz., what the words mean, as used in this statute; whereas the economists are always seeking to trace the effect of taxation throughout the community, and are apt to use the words 'direct' and 'indirect' according as they find that the burden of a tax abides more or less with the person who first pays it. This distinction is illustrated very clearly by the quotations from a very able and clear thinker, the late Mr. Fawcett, who, after giving his tests of direct and indirect taxation, makes remarks to the effect that a tax may be made direct or indirect by the position of the taxpayers or by private bargains about its payment. Doubtless, such remarks have their value in an economical discussion. Probably it is true of every indirect tax that some persons are both the first and the final payers of it; and of every direct tax that it affects persons other than the first payers; and the excellence of an economist's definition will be measured by the accuracy with which it contemplates and embraces every incident of the thing defined. But that very excellence impairs its value for the purposes of the lawyer. The legislature cannot possibly have meant to give a power of taxation valid or invalid according to its actual results in particular cases. It must have contemplated some tangible dividing line referable to and ascertainable by the general tendencies of the tax and the common understanding of men as to those tendencies."

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The result of these observations, which are closely applicable to the present case, is that their Lordships have primarily to consider, not whether in the view of an economist the business tax imposed on an owner under s. 394 of the Halifax city charter would ultimately be borne by the owner or by some one else, but whether it is in its nature a direct tax within the meaning of s. 92, head 2, of the Act of Union. The framers of that Act evidently regarded taxes as divisible into two separate and distinct categories—namely, those that are direct and those which cannot be so described, and it is to taxation of the former character only that the powers of a Provincial government are made

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to extend. From this it is to be inferred that the distinction between direct and indirect taxes was well known before the passing of the Act; and it is undoubtedly the fact that before that date the classification was familiar to statesmen as well as to economists, and that certain taxes were then universally recognized as falling within one or the other category. Thus, taxes on property or income were everywhere treated as direct taxes; and John Stuart Mill himself, following Adam Smith, Ricardo and James Mill, said that a tax on rents falls wholly on the landlord and cannot be transferred to any one else. "It merely takes so much from the landlord and transfers it to the State" (*Political Economy*, vol. ii., p. 416). On the other hand, duties of customs and excise were regarded by every one as typical instances of indirect taxation. When therefore the Act of Union allocated the power of direct taxation for Provincial purposes to the Province, it must surely have intended that the taxation, for those purposes, of property and income should belong exclusively to the Provincial legislatures, and that without regard to any theory as to the ultimate incidence of such taxation. To hold otherwise would be to suppose that the framers of the Act intended to impose on a Provincial legislature the task of speculating as to the probable ultimate incidence of each particular tax which it might desire to impose, at the risk of having such tax held invalid if the conclusion reached should afterwards be held to be wrong.

What then is the effect to be given to Mill's formula above quoted? No doubt it is valuable as providing a logical basis for the distinction already established between direct and indirect taxes, and perhaps also as a guide for determining as to any new or unfamiliar tax which may be imposed in which of the two categories it is to be placed; but it cannot have the effect of disturbing the established classification of the old and well known species of taxation, and making it necessary to apply a new test to every particular member of those species. The imposition of taxes on property and income, of death duties and of municipal and local rates is, according to the common understanding of the term, direct taxation, just as the exaction of a customs or excise duty on commodities or of a percentage duty on services would ordinarily be regarded as indirect taxation; and although new forms of taxation may from time to

time be added to one category or the other in accordance with Mill's formula, it would be wrong to use that formula as a ground for transferring a tax universally recognized as belonging to one class to a different class of taxation.

If this be the true view, then the reasoning of the majority of the Supreme Court of Canada requires reconsideration. It may be true to say of a particular tax on property, such as that imposed on owners by s. 394 of the Halifax charter, that the tax payer would very probably seek to pass it on to others; but it may none the less be a tax on property and remain within the category of direct taxes. Probably no one would say that the income tax levied in this country under sch. A of the Income Tax Act, although levied upon the occupier of property who is authorized to recover it from the owner, is not a direct tax. So, although a customs duty paid by a person importing commodities for his own use is not passed on to any one else, it would hardly be contended that such a duty is a direct tax within the meaning of the British North America Act. It is the nature and general tendency of the tax and not its incidence in particular or special cases which must determine its classification and validity; and, judged by that test, the business tax imposed on an owner under s. 394 is a direct tax.

The authorities cited by Newcombe J. show the use made by this Board of Mill's definition in determining whether a new or special tax, such as a stamp duty, a licence duty or a percentage on turnover, should be classed as direct or indirect; but, with the possible exception of *Cotton v. The King* (1), which seems to have turned on its own facts, they do not afford any instance in which a tax otherwise recognized as direct has been held to be indirect for the purposes of the British North America Act by reason of any theory as to its ultimate incidence. On the other hand, the case of *City of Montreal v. Attorney-General for Canada* (2), where land in Montreal belonging to the Crown in right of the Dominion and let to a tenant was held to have been validly assessed under a section of the city charter which enacted that persons occupying for

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(2) [1923] A.C. 136.

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commercial purposes land belonging to the Federal Government should be taxed as if they were the owners, appears to be directly in point and to support the contention of the appellant in this case.

Upon the whole their Lordships have come to the conclusion that the tax here in dispute is direct taxation within the meaning of the statute, and accordingly that this appeal should be allowed and the decision of the Supreme Court of Nova Scotia restored, and that the respondent estate should be ordered to pay the costs of the appellant here and below; and they will humbly advise His Majesty accordingly.

Solicitors for the appellant: *Linklaters & Paines*.

Solicitors for respondents: *Freshfields, Leese & Munns*.

[PRIVY COUNCIL.]

ATTORNEY-GENERAL FOR ALBERTA... APPELLANT;

AND

ATTORNEY-GENERAL FOR CANADA... RESPONDENT.

[AND CROSS-APPEAL.]

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada (Alberta)—Escheats—Bona Vacantia—Rights of Dominion and Province—Legislative Power of Province—Ultimate Heir Act, 1921 (R.S. Alta., 1922, c. 144)—Land Titles Act, 1894 (57 & 58 Vict. c. 28, Dom.), s. 5—Alberta Act, 1905 (4 & 5 Edw. 7, c. 3, Dom.), ss. 3, 21—British North America Act, 1867 (30 & 31 Vict. c. 3), s. 109; s. 92, head 13.

Lands in Alberta granted by the Crown either before or after September 1, 1905, when the Alberta Act came into force, in the absence of heirs, escheat to the Crown in the right of the Dominion.

The Land Titles Act, 1894 (Dom.), and the Land Titles Act, 1906 (Alta.), which provided for registration of titles, and that land certificated thereunder should be dealt with as personal estate upon the death of the owner, had not the effect of altering the tenure of the land, nor, where the Crown was the grantor, of enlarging the ordinary ambit of the grant.

Trusts and Guarantee Co. v. The King (1917) 54 Can. S.C.R. 107 approved.

The word "royalties" in s. 21 of the Alberta Act, which provided that "all Crown lands, mines, and minerals and royalties incidental thereto" should continue to be vested in the Crown for the purposes of Canada, includes escheats; that is so whenever the lands were granted, as the words "lands, mines, and minerals" include all the interest of the Crown therein.

Attorney-General of Ontario v. Mercer (1883) 8 App. Cas. 767 applied.

Bona vacantia in Alberta belong to the Crown in the right of the Province. Reading the whole of the Alberta Act together, the effect of s. 3 was to place the Province of Alberta in the same position in regard to property as the Provinces previously constituted save so far as the Act provided otherwise, either expressly or by reasonable implication.

The Ultimate Heir Act (R.S. Alta., 1922, c. 144), which provided that the University of Alberta should be the ultimate heir of property in the Province upon failure of descent, is ultra vires so far as it purported to affect real property. The Act is in substance one designed to defeat the right of the Crown reserved by s. 21 of the Alberta Act, and not an exercise of the legislative authority of the Province in relation to the law of inheritance.

In re Stone [1924] S.C.R. 682 distinguished.

Judgment of the Supreme Court of Canada [1927] S.C.R. 136 affirmed.

CONSOLIDATED APPEAL and CROSS-APPEAL (No. 157 of 1926) by special leave from a judgment of the Supreme

*Present: LORD HAILSHAM L.C. VISCOUNT HALDANE, LORD BUCKMASTER, LORD WRENBURY, and LORD WARRINGTON OF CLYFFE.

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Court of Canada (April 20, 1927) varying a judgment of the Appellate Division of the Supreme Court of Alberta (February 1, 1926).

The case giving rise to the consolidated appeal came before the Appellate Division of the Supreme Court of Alberta as a consolidation of three applications by administrators for directions upon questions arising in the administration of the estates of three deceased persons. The Attorney-General for Canada and the Attorney-General for Alberta intervened.

The case raised questions as to the rights of the Dominion and of the Province respectively in escheats and bona vacantia in the Province, and the further question whether the Ultimate Heir Act (Alb. 1921, c. 11, and R.S. Alta., 1922, c. 144) was ultra vires.

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p. 477. The provisions of the British North America Act, 1867, s. 109, and of the Alberta Act, 1905 (Dom.), ss. 3, 23, which were material to the questions raised, as well as the essential provisions of the Ultimate Heir Act, are fully set out in the judgment of the Judicial Committee.

The following questions were submitted to the Appellate Division:—

1. Do lands situated in the Province of Alberta granted by the Crown since September 1, 1905, when the Alberta Act (4 & 5 Edw. 7, c. 3) came into force, which have escheated for want of heirs or next of kin escheat to the Crown in the right of the Dominion or in the right of the Province? 2. Do escheated lands in the Province of Alberta granted by the Crown prior to September 1, 1905, which have not become Crown lands by escheat or otherwise prior to that date, escheat to the Crown in the right of the Dominion or in the right of the Province? 3. Does personal property situated in Alberta of persons domiciled in Alberta and dying intestate since September 1, 1905, without next of kin go to the Crown as bona vacantia in the right of the Dominion or of the Province? 4. Is c. 11 of 1921 (Alberta), now the Ultimate Heir Act, R.S. Alta., 1922, c. 144, ultra vires in whole or in part?

The Appellate Division answered the first of the above questions in favour of the Dominion, the second and third in favour of the Province, and in answer to the fourth held that the Ultimate Heir Act was intra vires. The reasons

of the majority of the learned judges, and of Ives J. who dissented, appear in a report of the proceedings at 22 Alb. L.R. 186.

The Attorney-General for Canada appealed from the judgment, so far as it upheld the contentions of the Province, to the Supreme Court of Canada.

The appeal was heard by Anglin C.J., and Idington, Duff, Mignault, Newcombe, and Rinfret JJ., of whom Idington J. did not take part in the judgment. The judgment of the Court, delivered by Duff J., held, as to question 2, that escheated lands granted before September 1, 1905, like those granted after that date, escheated to the Crown in the right of the Dominion; and, as to question 4, that the Ultimate Heir Act was ultra vires so far as it affected real estate. The appeal is reported at [1927] S.C.R. 136.

The Attorney-General for Alberta appealed to the Privy Council by special leave, and the Attorney-General for Canada cross-appealed from so much of the judgment as held that bona vacantia belonged to the Province, and from the limitation of the invalidity of the Ultimate Heir Act by the words "in so far as it affects real estate." The appeal and cross-appeal were consolidated.

1928. May 7, 8, 10, 11. *O. M. Biggar K.C.* and *Hon. Geoffrey Lawrence K.C.* for the Attorney-General for Alberta. The effect of s. 3 of the Alberta Act was to apply to the Province the provisions of s. 109 of the British North America Act, 1867, as if Alberta "had been one of the Provinces originally united," subject only to such variations as the Alberta Act introduced. Consequently escheats belong to the Province, as decided by the Board in *Attorney-General of Ontario v. Mercer* (1), unless s. 21 of the Alberta Act provides otherwise. To ascertain the true effect of that section it is necessary to consider the position as to Crown lands when the Act was passed. Since 1867 legislation had provided for the administration of ungranted Crown lands in the territory out of which Alberta was formed. The Land Titles Act, 1894 (Dom.), provided, by s. 5, that land granted and patented thereunder should descend as personal estate, and by s. 114 that the personal representative of a patented owner on his decease could himself obtain a certificate, which, by s. 117, was to be conclusive against the

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Crown. That Act was replaced by the Land Titles Act, 1906 (Alta.), which was in similar terms. Sect. 21 of the Alberta Act did not apply to Crown lands which had already been granted, because they had already been “administered” in accordance with the Act of 1894, and had ceased to be Crown lands within the meaning of s. 21; that view is supported by the use of the word “continue” in s. 21. Having regard to s. 20, Crown lands meant the “public land.” So too upon Crown lands being granted after September 1, 1905, they were thereby “administered,” and s. 21 ceased to apply to them. [Reference was made to *St. Catherine’s Milling and Lumber Co. v. The Queen* (1) and *Attorney-General of British Columbia v. Attorney-General of Canada*. (2)] This construction of s. 21 does not exclude the reservation of precious metals, because, applying the word “Crown” to each of the nouns which follow, precious metals are reserved without resort to the word “royalties.” With regard to bona vacantia, there was nothing in the Alberta Act to take them out of the operation of ss. 102 and 109 of the British North America Act, 1867. Therefore under the decision of the Board in *Rex v. Attorney-General of British Columbia* (3) they belonged to the Province. But whether escheats and bona vacantia vested in the Crown in the right of the Dominion or of the Province, the Ultimate Heir Act was intra vires. The Act regulated the course of inheritance of property in the Province, a matter within the exclusive power of the Provincial Legislature under the British North America Act, 1867, s. 92, head 13: *In re Stone*. (4)

Macmillan K.C. and *J. B. McBride* (*T. Mathew* with them) for the Attorney-General for Canada. The Land Titles Act, 1894, did not abolish the right of escheat. It was an Act dealing with registration of titles; it would be odd if it had the effect of altering the tenure of Crown lands so that they were thenceforth held allodially. Sect. 2, sub-s. 24, refers to Crown grants being made “in fee,” i.e. not allodially. On this point the reasoning of *Idington J.* in *Trusts and Guarantee Co. v. The King* (5) is adopted. The legislation of 1905 did not transfer to the Province the rights of escheat and bona vacantia which undoubtedly

(1) (1888) 14 App. Cas. 46, 56.

(3) [1924] A.C. 213.

(2) (1889) 14 App. Cas. 295, 305.

(4) [1924] S.C.R. 682.

(5) 54 Can. S.C.R. 107, 124 et seq.

had previously been vested in the Dominion. The position of Alberta at its constitution as a Province differed from that of the Provinces as to which the Board has hitherto considered the rights to escheats and bona vacantia. They were Crown colonies previously to their constitution as Provinces and owned lands and royalties. Alberta owned no lands or royalties either in 1867 or in 1905. The land out of which the Province was carved belonged to the Hudson Bay Company until 1870, when it was transferred to the Dominion. Sects. 19 to 21 of the Alberta Act show that the Province was created with differences distinguishing it from the original Provinces. Sect. 109 of the British North America Act, 1867, expressly applies only to lands, etc., "belonging to the several Provinces." If, however, s. 109 applies save so far as it is varied, s. 21 of the Alberta Act varied it so far as escheats are concerned. As in *Mercer's* case (1) "royalties" includes escheats; the right of escheat was incident to the Crown lands whenever they were granted. It was not necessary in the Alberta Act to deal with bona vacantia expressly. The rights therein could be taken away from the Dominion only by express words having regard to s. 16 of the Interpretation Act; there arose no "necessary and unavoidable" implication by having the effect contended for. The Ultimate Heir Act was wholly ultra vires. The real nature of the legislation must be looked to: *Attorney-General for Ontario v. Reciprocal Insurers*. (2) Though ostensibly an Act dealing with succession, it was in its real nature an Act to divert the rights of the Crown from the Dominion to the Provinces.

O. M. Biggar K.C. replied.

June 19. The judgment of their Lordships was delivered by

LORD BUCKMASTER. The questions raised on these appeals are whether the Crown possesses in the right of the Dominion of Canada the title to (1.) escheated lands and (2.) bona vacantia within the Province of Alberta. The Supreme Court of Canada has decided the first question in the affirmative and the second in the negative. The appeal by the Attorney-General of Alberta is against this judgment on the first point and the cross-appeal of the Attorney-General of Canada upon the second.

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(1) 8 App. Cas. 767.

(2) [1924] A.C. 328, 337, 338.

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The Province of Alberta was created pursuant to the British North America Act of 1871 by a statute of the Dominion passed in 1905 (4 & 5 Edw. 7, c. 3) called the Alberta Act. Before its constitution and apart from the effect of the Land Titles Act of 1894, there is no real dispute on this appeal as to the title of the Crown in right of the Dominion to escheated properties and bona vacantia in the territories that now form part of the Province.

The main features of the present dispute are, first, the effect of the Land Titles Act of 1894; secondly, that of the Alberta Act; and thirdly, whether the Province had power to deal with the property in question.

The actual statute by which the Provinces have purported to exercise the rights they claim is an Act entitled the Ultimate Heir Act, passed in 1921, the essential provision of which is in the following terms: "(1.) When any person dies intestate in fact in respect of lands situate in the Province of Alberta, or being domiciled in Alberta dies intestate in respect of any moveable property or chose in action, and no person or corporation is otherwise than under the provisions of this Act entitled thereto as the heir or next-of-kin of the intestate, then the latter shall be deemed to have made a duly executed and entirely valid will, devising or bequeathing such land, moveable property or chose in action to the body corporate known as the Governors of the University of Alberta." It is this provision that has been held *ultra vires* so far as it relates to lands by the Supreme Court of Canada.

The facts that have given rise to this dispute are the deaths of three people named Wudwud, Malesko and Stevenson, who were domiciled in the Province of Alberta, and died respectively on June 24, 1918, April 24, 1921, and November 8, 1919, leaving both lands and goods without heirs or next-of-kin. The administrators of the several estates made applications to the Supreme Court of Alberta for advice as to their distribution, alleging that no heir, next-of-kin or other person entitled to the property of the deceased had been found.

The three applications having been consolidated, the Appellate Division of the Supreme Court of Alberta, Ives J. dissenting, declared the Ultimate Heir Act to be valid and to apply to the real and personal property of any intestate

such as Malesko, who died after that Act came into force, In respect of the estates of Wudwud and Stevenson, who died after the constitution of the Province on September 1, 1905, and before the Ultimate Heir Act came into force, the Court directed (*a*) that personal property was to be distributed as bona vacantia to His Majesty in the right of the Province, and (*b*) that lands granted by the Crown after September 1, 1905, were to be distributed to His Majesty in the right of the Dominion. The Court also declared that, apart from the provisions of the Ultimate Heir Act, lands such as Stevenson's, granted before September 1, 1905, and escheating after that date, were distributable to His Majesty in the right of the Province. The question of the property being chargeable with the debts of the deceased was left undecided with liberty to apply. On appeal to the Supreme Court of Canada this judgment was affirmed only as to (*b*) and as to the personal estate.

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It follows from this statement that the Land Titles Act, 1894, first needs consideration. This Act replaced earlier legislation on the same subject and was, after the constitution of the Province, repealed as to Alberta, its terms being reproduced in a Provincial statute known as the Land Titles Act, 1906. It was an Act for the registration of title, and provides that a certificate of title granted pursuant to the statute shall be conclusive evidence as against His Majesty and all persons whomsoever that the person named on such certificate is entitled to the land included therein. It also provides that upon death of the owner of any land for which a certificate has been granted, the land shall vest in the personal representative of the dead owner, who upon a memorandum of probate or letters of administration being entered in the Register shall be deemed to be the owner of the land, and by s. 5 it is enacted that the land should descend to the personal representative in the same manner as personal estate and be dealt with and distributed as personal estate. The argument of the appellants upon this Act is that the ownership effected by grant from the Crown followed by registration destroys the right of the Crown to escheated lands, and, further, that in order to assimilate the descent of real and personal estate it is necessary to exclude the right of escheat. Their Lordships think that this argument cannot be sustained.

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There is nothing in the statute to support the theory that on the registration of the title to land for the first time the character of the tenure under which it was originally held was changed, so that in case of the Crown being the grantor, the effect of the Act was to enlarge the ordinary ambit of the grant.

The reasoning of Anglin J. in *Trusts and Guarantee Co. v. The King* (1) upon this point, with which their Lordships agree, renders further elaboration unnecessary.

It is obvious that the title of the personal representative can be no greater than that of the owner whose estate he holds, and the provision as to the descent of land as personal estate does not affect the question, for escheated lands have not descended, and whether they can be sold and used for payment of debts, which has been left open, is not material, for even if they were so liable, to the extent to which they were not needed for this purpose they would still remain the subject of escheat, and though they might have been actually converted they would for this purpose retain the quality of real property by analogy to the doctrine of *Ackroyd v. Smithson*. (2)

Turning now to the Alberta Act of 1905, it is necessary to consider this in relation to the British North America Act of 1867. This Act united the Provinces of Canada, Nova Scotia and New Brunswick, each of which possessed separate legislatures at the time of the Union. It divided the Province of Canada into two Provinces, Ontario and Quebec, and gave to each Provincial legislature the right to make laws with regard to property and civil rights within the Province.

By s. 109 it was provided: "All lands, mines, minerals, and royalties belonging to the several Provinces of Canada, Nova Scotia and New Brunswick at the Union, and all sums then due or payable for such lands, mines, minerals or royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any interest other than that of the Province in the same."

The territory out of which the Province of Alberta is constituted was unaffected by this section, but on the

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(1) 54 Can. S.C.R. 107, 124 et seq.

(2) (1780) 1 Bro. C.C. 503.

admission of the North-West Territories into the Dominion of Canada in 1870 and the passing of the British North America Act, 1871, became subject to the laws of the Parliament of Canada. It therefore followed that the Province could never, apart from statute, be in the position of owning lands, mines, minerals and royalties.

Sect. 3 of the Alberta Act of 1905, however, made the provisions of the British North America Acts applicable to the Province of Alberta in the following words: "The provisions of the British North America Acts, 1867 to 1886, shall apply to the Province of Alberta in the same way and to the like extent as they apply to the Provinces heretofore comprised in the Dominion, as if the said Province of Alberta had been one of the Provinces originally united, except in so far as varied by this Act, and except such provisions as are in terms made, or by reasonable intendment, may be held to be specially applicable to or only to affect one or more and not the whole of the said Provinces."

By s. 21 an exception in favour of Crown lands was made in the following terms: "All Crown lands, mines, and minerals and royalties incident thereto, and the interest of the Crown in the waters within the province under the North-West Irrigation Act, 1898, shall continue to be vested in the Crown and administered by the Government of Canada for the purposes of Canada, subject to the provisions of any Act of the Parliament of Canada with respect to road allowances and roads or trails in force immediately before the coming into force of this Act, which shall apply to the said province with the substitution therein of the said province for the North-West Territories."

"Royalties," within the meaning of s. 109 of the British North America Act of 1867, has been held in the case of the *Attorney-General of Ontario v. Mercer* (1) to include escheats. The reasoning of that case was this: that an escheat is essentially a royalty, and the only difficulty lay in deciding whether the interposition of the words "mines and minerals" after the word "lands" was not sufficient to deprive the word "royalty" of its proper force. It was there declared that these words did not have that effect, and, in consequence, the escheated lands were included in the pro-

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visions of s. 109 of the British North America Act, 1867, and belonged to the Crown in the right of the Province. The difference in the language between s. 21 of the Alberta Act and s. 109 of the British North America Act is not, in their Lordships' opinion, sufficient to warrant any real distinction in effect. The royalties must in the latter, as in the former, case be taken to include escheats, and these are reserved to the Crown for the purposes of Canada. This conclusion applies to all lands whenever granted, for the argument that the royalties reserved were only those in relation to lands then held as Crown lands cannot be maintained, in the words of Duff J.: "Crown lands, mines and minerals" does not necessarily import "lands, mines and minerals" held by the Crown in full proprietorship, it may be read as including all interests of the Crown "in lands, mines and minerals within the Province," and this their Lordships think is the correct interpretation.

Considering now the case of bona vacantia, it is plain that they are unaffected by this argument. They are not incident to Crown lands, mines or minerals, and are therefore not included in the reserved property mentioned in s. 21. The Attorney-General for Canada, however, argues that they cannot belong to the Province, since they never had so belonged before the Province was constituted, and there is nothing in the Act of 1905 to confer such a title. Their Lordships think that this argument does not do justice to the fundamental provisions of s. 3 of the Alberta Act. Reading the whole Act together they regard the effect of this section as placing the Province of Alberta in the same position as the other Provinces in regard to property, except as varied by the statute, either by express terms or reasonable implication. Sect. 21 is only sensible on this hypothesis, for unless it was assumed that it was required for the purpose of preserving the Crown rights in the property to which it relates, it would be meaningless, but if that be once assumed it follows that the property to which it does not relate is vested in the Crown, not for the purposes of Canada, but for the purposes of the Province of Alberta.

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They therefore are of opinion that the cross-appeal of the Attorney-General for Canada fails.

There remains the question of the power of the Province to affect the title to the escheated lands by virtue of their

authority to make laws relating to property and civil rights within the Province. This right confers no power to deal directly with public property, which is expressly reserved by s. 91, head 1, to the Parliament of Canada. An Act, therefore, to declare that such property should vest in His Majesty in his right of Alberta would be void. This direct attack was indeed made by the Legislature of Alberta by an Act of 1915, c. 5, which was declared to be ultra vires by a judgment of the Supreme Court in *Trusts and Guarantee Co. v. The King*. (1) This judgment was a majority judgment, from which Idington and Brodeur JJ. dissented, but their Lordships think that the decision of the Supreme Court was right. The argument against the Act was most accurately stated in the following words of Fitzpatrick C.J. (2): "Judgment for the respondent on this appeal does not involve any decision as to the rights of the legislature of the province to change the laws of inheritance. Lands escheat to the Crown for defect of heirs and this has nothing to do with the question who are a person's heirs. But altering the law of inheritance is one thing and appropriating the right of the Dominion on failure of heirs is quite another thing."

The Act now in dispute, passed in 1921 by the Provincial Legislature, proceeded on different lines to reach the same goal. It provided that the University of Alberta should be the ultimate heir to all property where descent failed. This it is sought to justify upon the ground that the Province had power to alter succession and could impinge upon the Crown rights by introducing illegitimate or adopted children into the line of succession; that as to the former this had been done, and the provision held valid so far as Saskatchewan was concerned, a Province with similar rights to the Province of Alberta, in the case of *In re Stone*. (3)

Their Lordships think that the conclusion in that case may be safely accepted. The Provincial Government's power to control succession may be thus exercised provided that the statute is, when fairly regarded, designed solely for this end, but when under user of this power the Legislature attempts to defeat the Crown rights expressly reserved they have passed on to forbidden ground and

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.(1) 54 Can. S.C.R. 107.

.(2) 54 Can. S.C.R. 110.

.(3) [1924] S.C.R. 682.

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cannot justify their intrusion by a colourable pretext for their acts.

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The cases summarized in the judgment of Duff J. in the case of *Attorney-General for Ontario v. Reciprocal Insurers* (1) show that where collision between the rights of the Provincial and Dominion Parliaments arise under any statute the real purpose of the Act must be regarded in forming an opinion as to the validity of the statute. To use the words of the judgment referred to: "Where the law-making authority is of a limited or qualified character, obviously it may be necessary to examine with some strictness the substance of the legislation for the purpose of determining what it is that the Legislature is really doing."

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In the present case, while the University of Alberta exists, and it is to be hoped it will continue for a time that knows no measurable limit, the right of the Crown is completely defeated. It is not by varying or extending the ordinary rules of succession that this is accomplished, but by introducing outside all natural, lawful or conventional descendants or relations of a deceased an entirely foreign beneficiary and one in part, at least, dependent on the Provincial revenues. There is no real difference in substance, and only partially in effect, between this and the Act of 1915, and in their Lordships' opinion it is equally open to objection.

For these reasons they are of opinion that the appeal must fail and both the appeal and the cross-appeal should be dismissed without costs, and they will humbly advise His Majesty accordingly.

Solicitors for Attorney-General for Alberta: *Blake & Redden*.

Solicitors for Attorney-General for Canada: *Charles Russell & Co.*

(1) [1924] A.C. 328, 337, 338.

[PRIVY COUNCIL.]

THE KING.....APPELLANT;

AND

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ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada (Alberta)—Legislative Power of Province—Taxation—Tax on Gross Revenue from Mine—Indirect Taxation—Tendency of Tax—Mine Owners Tax Act, 1923 (Alb. Stat., 1923, c. 33)—British North America Act, 1867 (30 & 31 Vict., c. 3), s. 92, head 2.

The Mine Owners Tax Act, 1923, of Alberta, purported to impose upon every mine owner, as therein defined, a percentage tax upon the gross revenue of his mine during each preceding month:—

Held, that the tax was not direct taxation within the meaning of s. 92, head 2, of the British North America Act, 1867, and that the Act was therefore ultra vires. The tax in its real nature was a tax upon sales, and the general tendency would be to pass it on to the purchaser; it was not material that in particular circumstances it might be economically undesirable or practically impossible so to do, nor that the tax became payable before the sales took place.

Bank of Toronto v. Lambe (1887) 12 App. Cas. 575, 581, 582 followed. Judgment of the Supreme Court of Canada [1927] S.C.R. 257 affirmed.

APPEAL (No. 12 of 1928) by special leave from a judgment of the Supreme Court of Canada (February 1, 1927) reversing a judgment of the Appellate Division of the Supreme Court of Alberta (May 19, 1926), which affirmed a judgment of the Chief Justice.

The sole question in the appeal was whether an Act of Alberta, the Mine Owners Tax Act, 1923, was intra vires the Provincial legislature as being “direct taxation” within the British North America Act, 1867, s. 92, head 2.

The Chief Justice of Alberta held that the Act was intra vires, and that decision was affirmed by a majority of the Appellate Division.

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Upon a further appeal the Supreme Court of Canada, in a judgment reported at [1927] S.C.R. 257, held that the taxation was indirect and the Act accordingly ultra vires.

The material provisions of the Act appear from the judgment of the Judicial Committee.

Present: LORD HAILSHAM L.C., VISCOUNT HALDANE, LORD BUCKMASTER, LORD WRENBURY, and LORD WARRINGTON OF CLYFFE.

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1928. May 7. *O. M. Biggar K.C.* and *Hon. Geoffrey Lawrence K.C.* for the appellant. The tax was direct taxation within s. 92, head 2, of the British North America Act, 1867. At the time the tax was payable the sales in respect of which it was imposed had already taken place; it was therefore impossible to pass the tax on to the purchaser. The time of demand is the moment to consider: *Attorney-General for Quebec v. Reed*. (1) There is no case in which a tax has been held to be indirect where the fund taxed is in the hands of the taxpayer when the tax falls to be paid. Further, the tax was in effect a tax upon property, of the nature of an income tax. It was therefore direct taxation, without any consideration of the question whether it would be passed on: *City of Halifax v. Fairbank's Estate*. (2) [Reference was made also to *Attorney-General for British Columbia v. Canadian Pacific Rly. Co.* (3) and *Treasurer of Ontario v. Canada Life Assurance Co.* (4).]

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Pritt K.C. and *H. S. Patterson* for the respondents. The test is not whether upon any particular sale the tax is passed on, but what is the general tendency of the tax. The taxation was in effect a tax on each sale of a commodity, and the tendency would be to pass it on in anticipation of the liability. It is to be presumed that that was the intention. [Reference was made to *Bank of Toronto v. Lambe* (5); *Cotton v. The King* (6); *Brewers' and Maltsters' Case* (7); *Security Export Co. v. Hetherington* (8); *Attorney-General for Manitoba v. Attorney-General for Canada*. (9)]

O. M. Biggar K.C. replied.

June 12. The judgment of their Lordships was delivered by

LORD WARRINGTON OF CLYFFE. The question raised by this appeal is whether the Mine Owners Tax Act, 1923, of the Province of Alberta, which imposes upon mine owners as therein defined a percentage tax upon the gross revenues of their coal mines is ultra vires the Province as an attempt to impose indirect taxation.

.(1) (1884) 10 App. Cas. 141, 143.

.(2) Ante, pp. 117, 123. (A.C.)

.(3) [1927] A.C. 934.

.(4) (1915) 33 Ont. L.R. 433.

.(5) 12 App. Cas. 575.

.(6) [1914] A.C. 176.

.(7) [1897] A.C. 231.

.(8) [1923] S.C.R. 539, 559.

(9) [1925] A.C. 561.

The appeal, brought by special leave of His Majesty in Council, is from an order dated February 1, 1927, of the Supreme Court of Canada, whereby that Court, consisting of Anglin C.J. and Duff, Mignault, Newcombe and Rinfret JJ., unanimously allowed an appeal from the Appellate Division of the Supreme Court of Alberta in favour of the present appellant on the ground that in their opinion the tax in question is not a direct tax and therefore one which it was not within the competence of the Province to impose.

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The Act in question was passed by the Legislature of Alberta on April 21, 1923. It contained the following material provisions: "Section 3. Every mine owner shall from the last day of May, 1918, be subject to a tax upon the gross revenue received by him from his mine. Section 4. The said tax shall not be more than 2 per cent. of the said revenue and as determined by the Lieut.-Governor in Council under the provisions of this Act. Section 6. On or before the last day of each month each mine owner shall forward to the Minister a sum of money equal to 2 per cent. of the gross revenue received by him from his mine during the next preceding month."

The Act repealed a previous Act of the Province—the Mine Owners Tax Act, 1918—which also imposed a tax upon gross revenue, taking the form in that Act of 5c. per ton of the coal removed from the mine premises. The validity of this tax had been disputed by the mine owners who had in many cases refused to pay it.

On August 14, 1925, the Lieutenant-Governor by and with the advice of the Executive Council ordered that the tax in question should be 2 per cent. of the gross revenue received by the mine owner from his mine.

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The respondent company is a mine owner within the definition of that term contained in the Act in question. They began business in November, 1923. They refused to pay the tax, and on August 21, 1925, the action, in which the order under appeal was made, was commenced for the purposes of recovering the amount of the tax alleged to be due from them.

Is the taxation in question "direct taxation within the Province" within the meaning of s. 92 of the British North America Act, 1867?

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The question whether a tax is direct or indirect has on many occasions been the subject of decision by this Board, but it is unnecessary to refer to any of these decisions except that of *Bank of Toronto v. Lambe* (1), in which Lord Hobhouse, in delivering the judgment of the Board, made some useful observations as to the mode in which the question should be approached.

The passage has often been cited, but it is worth while citing it again: "First, is the tax a direct tax? For the argument of this question the opinions of a great many writers on political economy have been cited, and it is quite proper, or, rather necessary, to have careful regard to such opinions, as has been said in previous cases before this Board. But it must not be forgotten that the question is a legal one, viz., what the words mean, as used in this statute; whereas the economists are always seeking to trace the effect of taxation throughout the community, and are apt to use the words 'direct,' and 'indirect,' according as they find that the burden of a tax abides more or less with the person who first pays it. This distinction is illustrated very clearly by the quotations from a very able and clear thinker, the late Mr. Fawcett, who, after giving his tests of direct and indirect taxation, makes remarks to the effect that a tax may be made direct or indirect by the position of the taxpayers or by private bargains about its payment. Doubtless, such remarks have their value in an economical discussion. Probably it is true of every indirect tax that some persons are both the first and the final payers of it; and of every direct tax that it affects persons other than the first payers; and the excellence of an economist's definition will be measured by the accuracy with which it contemplates and embraces every incident of the thing defined. But that very excellence impairs its value for the purposes of the lawyer. The Legislature cannot possibly have meant to give a power of taxation valid or invalid according to its actual results in particular cases. It must have contemplated some tangible dividing line referable to and ascertainable by the general tendencies of the tax and the common understanding of men as to those tendencies."

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What then is the general tendency of the tax now in question?

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First, it is necessary to ascertain the real nature of the tax. It is not disputed that, though the tax is called a tax on "gross revenue," such gross revenue is in reality the aggregate of sums received from sales of coal, and is indistinguishable from a tax upon every sum received from the sale of coal.

The respondents are producers of coal, a commodity the subject of commercial transactions. Their Lordships can have no doubt that the general tendency of a tax upon the sums received from the sale of the commodity which they produce and in which they deal is that they would seek to recover it in the price charged to a purchaser. Under particular circumstances the recovery of the tax may, it is true, be economically undesirable or practically impossible, but the general tendency of the tax remains.

It is said on behalf of the appellant that at the time a sale is made the tax has not become payable, and therefore cannot be passed on. Their Lordships cannot accept this contention; the tax will have to be paid, and there would be no more difficulty in adding to the selling price the amount of the tax in anticipation than there would be if it had been actually paid.

Their Lordships therefore agree with the views expressed by the judges of the Supreme Court that the tax in question is not a direct tax.

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Some attempt was made in argument to support the tax on the ground that it is analogous to an income tax, which has always been regarded as the typical example of a direct tax; but there are marked distinctions between a tax on gross revenue and a tax on income, which for taxation purposes means gains and profits. There may be considerable gross revenues, but no income taxable by an income tax in the accepted sense.

For these reasons their Lordships are of opinion that the appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for appellant: *Blake & Redden.*

Solicitors for respondents: *Lawrence Jones & Co.*

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APPELLANT;

AND

LEGISLATIVE COUNCIL OF
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RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Canada (Nova Scotia)—Legislative Council of Nova Scotia—Constitution of Council—Tenure of Office—R. S. N. S., 1923, c. 2.—British North America Act, 1867 (30 & 31 Vict. c. 3), s. 88.

In answer to questions referred to the Supreme Court of Nova Scotia by the Lieutenant-Governor of that Province:—

Held, (1.) that the Lieutenant-Governor, acting by and with the advice of the Executive Council, has authority to appoint in the name of the Crown, by instrument under the Great Seal of the Province, members of the Legislative Council of the Province, although by the appointment the total number of members would (a) exceed twenty-one, or (b) exceed the total number of members who held their offices as members at the Union mentioned in s. 88 of the British North America Act, 1867.

(2.) The present total number of members of the Council is twenty-one, but the number can be increased by the Lieutenant-Governor in Council.

(3.) The tenure of office of members appointed prior to May 7, 1925, is during the pleasure of His Majesty, represented in that behalf by the Lieutenant-Governor in Council.

Pro forma judgment of the Supreme Court of Nova Scotia affirmed.

APPEAL (No. 41 of 1927) from a judgment of the Supreme Court of Nova Scotia (October 23, 1927) upon questions referred to that Court by the Lieutenant-Governor relative to the constitution of the Legislative Council of Nova Scotia, and the tenure of office of its members.

The questions referred, the facts, and material statutory provisions, also the opinions expressed by the learned judges of the Supreme Court of Nova Scotia, appear from the judgment of the Judicial Committee.

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1927. July 18, 19. *W. L. Hall K.C. (Attorney-General for Nova Scotia) and S. E. Pocock* for the appellant.

Stuart Jenks K.C. and W. C. Macdonald for the respondent Council.

*Present: VISCOUNT CAVE L.C., VISCOUNT HALDANE, LORD WRENBURY, LORD WARRINGTON OF CLYFFE, and MR. JUSTICE DUFF.

[Reference was made to *Lord Leconfield v. Thornely*. (1)]

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VISCOUNT CAVE L.C. This appeal, which is brought by leave of the Supreme Court of Nova Scotia, raises some questions of great importance relating to the Constitution of that Province.

On May 14, 1926, the Lieutenant-Governor of Nova Scotia in Council, acting under s. 226 of the revised statutes of the Province, referred to the Supreme Court of Nova Scotia for hearing and consideration the following matters:—

“1. Has the Lieutenant-Governor of Nova Scotia, acting by and with the advice of the Executive Council of Nova Scotia, power or authority to appoint in the name of the Crown by instrument under the Great Seal of the Province so many members of the Legislative Council of Nova Scotia that the total number of the members of such Council holding their offices or places as such members would (a) exceed twenty-one, or (b) exceed the total number of the members of said Council who held their offices or places as such members at the Union mentioned in s. 88 of the British North America Act, 1867?

“2. Is the membership of the Legislative Council of Nova Scotia limited in number?

“3. Is the tenure of office of members of the said Council appointed thereto prior to May 7, 1925, during pleasure or during good behaviour or for life?

“4. If such tenure is during pleasure, is it during the pleasure of His Majesty the King, or during the pleasure of His Majesty represented in that behalf by the Lieutenant-Governor of Nova Scotia acting by and with the advice of the Executive Council of Nova Scotia?”

The matters so referred to the Supreme Court were heard and considered by a Court consisting of four judges, who differed in opinion. The Chief Justice answered parts (a) and (b) of question No. 1 in the affirmative. His answer to question No. 2 was that at present a full house is twenty-one members, but the number can be increased at any time by the Lieutenant-Governor. His answer to

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question No. 3 was "during pleasure"; and his answer to question No. 4 was "during the pleasure of His Majesty represented in that behalf by the Lieutenant-Governor of Nova Scotia acting by and with the advice of the Executive Council for Nova Scotia." The opinion of Chisholm J. was substantially in agreement with that of the Chief Justice; but Mellish and Carroll JJ. took other views. Thereupon the Supreme Court, in accordance with r. 3 of the rules regulating appeals to His Majesty in Council from Nova Scotia, certified pro forma for all purposes of appeal to His Majesty in Council that its opinion on the matters referred to with the reasons therefor was according to the opinion of the Chief Justice and his reasons therefor, and ordered that final judgment be entered accordingly pro forma for all purposes of appeal to His Majesty in Council. It is from the judgment so pronounced that this appeal is brought.

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In order to arrive at a decision on the matters in controversy, it is necessary to go some way back into the history of Nova Scotia. There had been for some time a Council with legislative and executive authority, when, on February 6, 1838, Her Majesty Queen Victoria issued her Commission to the Earl of Durham appointing him Captain-General and Governor-in-Chief of the Province, and directing that (in addition to the general Assembly of freeholders and settlers referred to in the Commission) there should be within the Province two distinct and separate councils to be respectively called the Legislative Council and the Executive Council and to have the powers therein mentioned; and the Commission proceeded as follows: "And we do hereby appoint and declare that the said Executive Council and the said Legislative Council respectively, shall hereafter consist of such and so many members, as shall from time to time for that purpose be nominated and appointed by us, under our sign manual and signet, or as shall be provisionally appointed by you, the said John George, Earl of Durham, until our pleasure therein shall be known. Provided, nevertheless, and we do hereby declare our will and pleasure to be that the total number of the members for the time being of our said Executive Council, resident within our said Province, shall not at any time, by any provisional appointment, be raised to a greater number in the whole than nine, and that

the total number of members of the said Legislative Council, resident within our said Province, shall not at any time by any such provisional appointments be raised to a greater number in the whole than fifteen; and we do further direct and appoint that five members of our said Executive Council shall be a quorum for the despatch of the business thereof, and that eight members of our said Legislative Council shall be a quorum for the despatch of the business thereof; and we do further direct and appoint that the members of our said respective Councils shall hold their places therein during our pleasure and not otherwise."

The Commissions subsequently issued to Sir John Colburne (afterwards Lord Seaton) in December, 1838, to Mr. Charles Poulett Thomson (afterwards Lord Sydenham) in September, 1839, to Sir Charles Bagot in October, 1841, and to Sir Charles Theophilus Metcalfe in February, 1842, appointing them successively to be Captains-General and Governors-in-Chief of Nova Scotia, contained directions as to the constitution and appointment of the two Councils similar to those contained in Lord Durham's Commission. In the Commission issued to Earl Cathcart on his appointment to the Governorship in March, 1846, the same directions were repeated with the substitution of twenty-one for fifteen as the maximum number of members of the Legislative Council who might be provisionally appointed by the Governor; and like directions were contained in the Commissions issued successively to the Earl of Elgin in October, 1846, to Sir Edmund Walker Head in September, 1854, and to Viscount Monck on November 2, 1861. As the Commission to Viscount Monck remained in force until the Confederation of Canada in 1867, it is desirable to quote here the exact terms of the directions as to the number and constitution of the Legislative Council which were contained in that Commission. They ran as follows: "And we do hereby declare our pleasure to be that the said Legislative Council shall consist of such and so many members as have been or shall hereafter be from time to time for that purpose nominated and appointed by us under our sign-manual and signet, or as shall be provisionally appointed by you until our will therein shall be known, all which members shall hold their places in the said Council during our pleasure: Provided, nevertheless, and we do hereby declare our pleasure to be that the total number of

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the members of the said Legislative Council for the time being resident within our said Province shall not at any time by any such provisional appointments be raised to a greater number in the whole than twenty-one."

This, then, was the position when the British North America Act of 1867 was passed. That Act provided (by s. 88) as follows: "The constitution of the Legislature of each of the Provinces of Nova Scotia and New Brunswick shall, subject to the provisions of this Act, continue as it exists at the union until altered under the authority of this Act; and the House of Assembly of New Brunswick existing at the passing of this Act shall, unless sooner dissolved, continue for the period for which it was elected." By s. 92, head 1, of the same Act it was provided that in each Province the Legislature might exclusively make laws in relation to "the amendment from time to time, notwithstanding anything in this Act, of the constitution of the Province, except as regards the office of Lieutenant-Governor." By an Act of the Province of Nova Scotia passed on April 18, 1872, it was enacted as follows: "After the passing of this Act the appointment of members of the Legislative Council in the Province of Nova Scotia shall be vested in the Lieutenant-Governor, who shall make such appointments in the Queen's name by instrument under the Great Seal of the Province." In the revised statutes of Nova Scotia of 1923, c. 2, the above enactment appeared in the following form: "Sect. 1.—In this chapter, unless the context otherwise requires, the expression 'Council' means the Legislative Council. Sect. 2.—The appointment of members of the Council is vested in the Governor-in-Council, who shall make such appointment in the name of the Crown by instrument under the Great Seal of the Province." The word "Governor" in this enactment is defined as meaning the Lieutenant-Governor. Lastly, by an Act of the Province passed on May 7, 1925, the section last quoted of the revised statutes of 1923 was amended by adding thereto a provision that every member of the Council thereafter appointed should hold his seat in the Council for the term of ten years from the date of his appointment. It is by reason of this enactment that the third question referred to the Supreme Court was confined to members appointed before May 7, 1925.

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These being the relevant statutes and documents, their Lordships proceed to consider the questions referred to the Supreme Court in their order.

The first and second questions may conveniently be dealt with together.

It is plain from the above statement that the Commissions issued to successive Governors from the year 1838 until the Union of Canada did not by their terms impose any limit upon the number of members of the Legislative Council of the Province who might be appointed by the Sovereign. There was indeed a limit—originally of fifteen and afterwards of twenty-one—upon the number of such members who might be provisionally appointed by the Governor subject to confirmation by the Queen; but this provision in no way purported to restrict the power of the Queen herself to appoint “such and so many members” of the Council as she should from time to time think fit. In the year 1838, when the number of Legislative Councillors to be provisionally appointed by the Governor was limited by the Commission to fifteen, Queen Victoria, in fact, appointed nineteen such Councillors; and, although the number was never, in fact, raised above twenty-one, there was nothing in the Commissions which would have prevented Her Majesty from so raising the number at any time during that period.

Then was there anything outside the Commissions to limit the number to twenty-one? For this purpose stress was laid on behalf of the respondents on a correspondence which passed between the Lieutenant-Governor for the time being of the Province (Viscount Falkland) and Lord Stanley as Colonial Secretary in the year 1845; and it is true that in a letter dated August 20, 1845, Lord Stanley seemed to concur in the view that, as a part of certain changes then contemplated, the number of Legislative Councillors might be fixed at twenty-one. But in the Commission issued to Lord Cathcart shortly after the date of this correspondence, while the maximum number of provisional appointments to the Council was for the first time raised to twenty-one, no limit was placed upon the number of members who might be permanently appointed by the Sovereign; and the inference must be that it was the intention of Queen Victoria, while in practice confining her appointments to twenty-one, not to impose

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any limit on her own power to make appointments exceeding that number. Similar observations apply to a letter of May 4, 1846, written by Mr. W. E. Gladstone as Secretary of State for the Colonies; and it is noticeable that in February, 1864, the Duke of Newcastle, while declining on grounds of policy to advise Her Majesty to increase the number of the Council above twenty-one for the mere purpose of giving a majority in that body to the Government of the day, expressed no doubt as to the power of the Queen to take that course if she had thought fit to do so. Their Lordships find nothing in this correspondence to limit the number of the Legislative Council.

But it was argued that s. 88 of the British North America Act, which provided that the constitution of the Legislature of Nova Scotia should, subject to the provisions of that Act, “continue as it existed at the union” until altered under the authority of the Act, had the effect of limiting the number of Legislative Councillors either to eighteen—the number of Councillors who were actually in office at the date of the union—or to twenty-one, the number then ordinarily appointed. Their Lordships are unable to accept this contention. It is the constitution of the Legislature, and not the number of persons actually or usually holding office under that constitution, which was to continue until altered under the authority of the Act; and the constitution then existing provided for the appointment of a Legislative Council not limited except by the decisions from time to time taken by the Sovereign under the advice of her Ministers.

It was further argued that, even assuming that before and at the date of the union the Sovereign had power on the advice of her Ministers in the United Kingdom to increase the membership of the Legislative Council of Nova Scotia, that power has not passed to the Lieutenant-Governor of the Province, but remains vested in the Sovereign in this country. Their Lordships cannot agree with that view. Whether on the passing of the British North America Act the power to appoint the members of the Legislative Council was delegated by virtue of that Act to the Lieutenant-Governor of Nova Scotia as the representative of the Crown for all purposes of Provincial government, it is unnecessary to inquire; for at all events that power has been vested in him since the passing of the

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Nova Scotia Act of 1872 and is now exercisable by him on the advice of his Executive Council. It has not been suggested that either the Act of 1872, which vested the appointment of members of the Legislative Council in the Lieutenant-Governor, or the statute of 1923, which declares the appointment of such members to be vested in the Lieutenant-Governor in Council, was not within the powers conferred upon the Provincial Legislature by s. 92, head 1, of the Act of 1867; and in their Lordships' opinion the right to increase the membership of the Council is not severable from the right to appoint new members. The power which was formerly reserved to the Sovereign was a power to appoint "such and so many members" of the Council as might from time to time appear expedient; and it is this power—which includes the power of increase—which has now become vested in the Lieutenant-Governor in Council. No doubt the exercise of the Lieutenant-Governor's power to increase the number of Legislative Councillors would be restrained by the considerations of policy set out in the letter of the Duke of Newcastle above referred to; but in law the membership of the Legislative Council is unlimited.

Their Lordships would therefore answer both parts of question 1 in the affirmative and question 2 in the negative.

The answer to the third question referred to the Supreme Court is dictated by similar considerations based on the history of the Province. It was expressly provided by Lord Durham's Commission of 1838 and by the Commissions issued to successive Governors after that time and before the Union that the members of the Legislative Council should hold their places therein during the Queen's pleasure; and, notwithstanding a suggestion made by the Council in the year 1846 that their tenure should be for life, no change was made in the form of the Commissions. It follows that according to the constitution of the Legislature as it existed at the time of the Union, the members of the Legislative Council were appointed during pleasure; and in this respect, as in others, the constitution was continued by s. 88 of the Act of 1867.

With regard to the fourth question, their Lordships agree with the opinion of the Chief Justice and Chisholm J. that the tenure is during the pleasure of the Sovereign represented in that behalf by the Lieutenant-Governor of

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Nova Scotia acting by and with the advice of the Executive Council of the Province. The effect of the Nova Scotia Act of 1872 as re-enacted in the revised statutes of 1923 is to vest in the Lieutenant-Governor in Council the appointment of members of the Legislative Council during pleasure; and in their Lordships' opinion this means that they are to be appointed during the pleasure of the appointing authority. It would be strange if the effect of the legislation of 1872 and 1923 were to enable the Lieutenant-Governor to make appointments which might be revoked by the Sovereign acting under the advice of His Ministers in this country; and in their Lordships' opinion this was not the intention or effect of the statutes in question. This view is supported by s. 23, sub-ss. 37 and 39 of c. 1 of the revised statutes, which provide as follows: "(37.) Words authorizing the appointment of any public officer or functionary, or any deputy, include the power of removing him, reappointing him, or appointing another in his stead, from time to time, in the discretion of the authority in whom the power of appointment is vested. (39.) Every officer appointed by the Lieutenant-Governor, unless it is otherwise provided in the enactment under which the appointment is made, shall remain in office during pleasure only."

The result is that their Lordships find themselves substantially in agreement with the opinions of the Chief Justice and Chisholm J. on every point; and they will humbly advise His Majesty that the questions referred to the Supreme Court should be answered as follows:—

Question 1 (*a*) and (*b*). Yes.

Question 2. At present a full house is twenty-one, but the number can be increased by the Lieutenant-Governor in Council.

Question 3. During pleasure.

Question 4. During the pleasure of His Majesty represented in that behalf by the Lieutenant-Governor of Nova Scotia acting by and with the advice of the Executive Council of Nova Scotia.

No question arises as to costs.

Solicitors for appellant: *Burchells*.

Solicitors for respondents: *Linklaters & Paines*.

[PRIVY COUNCIL.]

ROMAN CATHOLIC SEPARATE
SCHOOL TRUSTEES FOR TINY
AND OTHERS.....

APPELLANTS;

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AND

THE KING.....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada (Ontario)—Education—Roman Catholic Separate Schools—Rights at Confederation—Courses of Study and Grades of Education—Share in legislative Grants—Separate Schools Act, 1863 (26 Vict. c. 50, Can.), s. 20—British North America Act, 1867 (30 & 31 Vict. c. 3), s. 93, subss. 1, 3.

The trustees of a Roman Catholic separate school in Ontario, by a petition of right, claimed that certain Acts of the legislature of Ontario, and regulations made thereunder, were ultra vires, in that, and so far as, they prejudicially affected rights which the suppliants asserted that Roman Catholics had by law at Confederation in respect of separate schools, and which consequently were preserved by s. 93, sub-s. 1, of the British North America Act, 1867. They claimed: (1.) the right to establish and conduct courses of study and grades of education such as are conducted in continuation schools, collegiate institutes, and high schools; (2.) the right of supporters of Roman Catholic separate schools to exemption from rates for the support of continuation schools, collegiate institutes, and high schools not conducted by their own board of trustees; (3.) that separate schools were entitled under the Separate Schools Act, 1863, to share on the basis therein enacted, in all legislative grants for common schools, including all grants for the support of secondary schools; they prayed for judgment for the difference between the sum which they would have received out of the legislative grant for 1922 if their contentions were right, and the amount paid to them:—

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Held, that statutes passed before Confederation gave to the educational authorities full power to regulate separate schools, including power to determine the courses of study and grades of education therein; also, that the fund in which separate schools were entitled to share as enacted by the Separate Schools Act, 1863, s. 20, excluded moneys "otherwise appropriated by law," as expressed in the Common Schools Act, 1859, s. 106, and that it was not ultra vires after Confederation to make new appropriations, although they diminished what otherwise would have come to the separate schools. That consequently the suppliants' claim failed in law, but that it was open to them to appeal under s. 93, sub-s. 3, of the British North America Act, 1867, to the Governor-General in his quasi administrative capacity even if the legislation complained of was intra vires, since the words "any Provincial authority" in that sub-section included the Provincial legislatures.

Brophy v. Attorney-General of Manitoba [1895] A.C. 202 followed on the point last mentioned.

Judgment of the Supreme Court of Canada [1927] S.C.R. 637, which dismissed (being equally divided in opinion) an appeal from the Appellate Division of the Supreme Court of Ontario (60 Ont. L.R. 15), affirmed.

*Present: VISCOUNT HALDANE, LORD BUCKMASTER, LORD SHAW, LORD WRENBURY, and LORD BLANESBURGH.

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APPEAL (No. 158 of 1927) by special leave from a judgment of the Supreme Court of Canada (October 10, 1927) affirming on an equal division a judgment of the Appellate Division of the Supreme Court of Ontario (December 23, 1926), which affirmed a judgment of Rose J.

The appeal arose out of a petition of right brought in the Supreme Court of Ontario by the appellant board of trustees on behalf of themselves and all other boards of trustees of Roman Catholic separate schools in Ontario

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The petition claimed that certain Acts of the legislature of Ontario, and regulations made thereunder, were ultra vires, in that, and so far as, they prejudicially affected rights which they asserted that Roman Catholics had by law at the Union in respect of separate schools, and which consequently were preserved by s. 93, sub-s. 1, of the British North America Act, 1867. (1)

The nature of the rights claimed appears from the judgment of the Judicial Committee. Shortly stated they were: (1.) The right to conduct courses of study in Roman Catholic separate schools in Ontario similar to those in continuation schools, collegiate institutes, and high schools; (2.) that Roman Catholics in Ontario were exempt from taxation for the support of such schools and institutions not conducted by their own board of trustees; (3.) the right of separate schools under the Separate Schools Act, 1863, s. 20, to share in legislation grants for common schools on the basis which they asserted was the basis at Confederation—namely, unaffected by grants for the support of secondary education. They prayed for judgment for the difference between the amount which they as trustees were entitled out of the legislation grant for 1922 if their claims were valid, and the amount paid to them; also for declarations

(1) British North America Act, 1867 (30 & 31 Vict. c. 3), s. 93, sub-ss. 1, 3:—

“93. In and for each Province the Legislature may exclusively make laws in relation to education, subject and according to the following provisions: (1.) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the Province at the Union. . . .

(3.) Where in any Province a system of separate or dissentient schools exists by law at the Union or is thereafter established by the Legislature of the Province, an appeal shall lie to the Governor-General in Council from any Act or decision of any Provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education.”

that the following enactments of Ontario were ultra vires: 34 Vict. c. 33, ss. 36, 40; 6 Edw. 7, c. 52, s. 23, sub-s. 6; 7 Edw. 7, c. 50, s. 4, sub-ss. 3, 4; 10 Edw. 7, c. 102, s. 1; R.S. Ont., 1914, c. 265, s. 6; R.S. Ont., 1914, c. 268, ss. 33, 34, 37, 38, 39; 12 & 13 Geo. 5, c. 98, ss. 2, 3; 14 Geo. 5, c. 82, s. 2.

The petition of right, as amended in the Appellate Division, is set out in full in the report of the appeal to the Supreme Court of Canada.

The petition was heard by Rose J., who by a judgment reported at 59 Ont. L.R. 96 dismissed it. An appeal to the Appellate Division (Mulock C.J.O. and Magee, Hodgins, Ferguson, and Grant JJ.A.) was unanimously dismissed. The appeal is reported at 60 Ont. L.R. 15. Upon a further appeal to the Supreme Court of Canada the learned judges were divided in opinion. Anglin C.J., and Rinfret J. concurred in a judgment allowing the appeal on all points. Mignault J. agreed save as to the legislative grants; he was of opinion that the Act of 1863 did not apply to special grants or grants for particular purposes. Duff, Newcombe, and Lamont JJ. were of opinion that the appeal should be dismissed. The judgments are reported at [1927] S.C.R. 637.

1928. Feb. 21, 23, 24, 27, 28; March 1, 2, 5, 6. *Hellmuth K.C.* and *T. F. Battle* for the appellants.

Tilley K.C. and *McGregor Young K.C.* for the respondent.

June 12. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. Their Lordships are fully aware that this appeal is among the most important that have come before them from Canada in recent years. It relates to the interpretation of the Constitution of Canada in regard to the separate schools of a large part of her Roman Catholic population, and to the character of the rights conferred on them by the legislative settlement made at the time of Confederation under the British North America Act. So far as concerns the question brought before the Judicial Committee of the Privy Council, it will be found to be a question of pure law, turning on the interpretation and application of words in that Act. But it is none the less a question of far-reaching importance to

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Canada as a whole, and it has given rise to great differences of opinion among the judges of the Canadian Courts. The tribunals of Ontario, indeed, before whom the question came in the first instance, decided unanimously against the appellants' claim. But the learned judges of the Supreme Court, to which it was taken on appeal, were evenly divided.

Their Lordships have now to determine the point in issue as one of pure legal interpretation, disregarding every other consideration. This was the principle adopted by the Canadian judges, and it is one which their Lordships have to apply anew, seeking to decide the appeal on the footing of an examination of the provisions of the Constitution of Canada.

It will be necessary in the course of this judgment to refer in outline, later on, to the history of education in Canada, and particularly to the phase of that history which is concerned with the development of the provisions made in regard to religious education. But before entering on this it is desirable to formulate distinctly the real point in this appeal and the nature of the proceedings by which it has been raised. These proceedings took the form of a petition of right presented by the appellants to the Supreme Court of Ontario. The petition claimed that certain Acts of the legislature of that Province, and certain regulations purporting to have been passed under these Acts, prejudicially affected the rights conferred by the British North America Act on the appellants and were *ultra vires*. The appellants asked for a declaration that the Acts of the legislature, which had sought to alter the basis of distribution of legislative grants which existed at the date of Confederation, were *ultra vires* so far as concerned separate schools, and for judgment for a sum equal to the difference between the amount paid to the trustees of the Roman Catholic School for school section No. 2 in the Township of Tiny, out of the legislative grant of the Province for 1922, and the amount that would have come to it if effect had been given to the Separate School Act, 1863, which was in force at Confederation, and created (it is claimed) a right which the legislature of the Province had no power after Confederation to affect prejudicially. The appellants also claimed that they had the right to establish and conduct in their own schools courses of study and grades of education such as were being conducted in continuation schools, collegiate institutes

and high schools, and that all regulations purporting to affect that right were invalid. They asked for a further declaration that the supporters of Roman Catholic separate schools were exempt from the rates imposed for the support of the former kind of schools, unless established or conducted by boards of trustees of Roman Catholic separate schools.

All of these claims were traversed by the Attorney-General of Ontario on behalf of the Government of Ontario.

The question which has to be decided is one of far-reaching magnitude. To understand its scope it is necessary to have in mind the history of education in Canada, including that of s. 93 of the British North America Act, 1867. That section embodies a compromise. The language proposed by the conferences of delegates from the various parts of Canada, which passed resolutions at Quebec on October 10, 1864, was not adopted, so far as the final arrangement was concerned, in the form in which the resolutions were passed: see Cartwright's Cases on the B.N.A. Act, vol. ii., Quebec resolution No. 43. Resolution 43 proposed to give power to the local legislatures to make laws as to education, saving the rights and privileges which the Protestant and Catholic minority in both Canadas might possess as to their denominational schools at the time when the Union came into operation. In the British North America Act, as passed by the Imperial Parliament, the substance of this resolution is not included in s. 92, but is embodied in a separate section, 93. The separate section enacts that in and for each Province the legislature may exclusively make laws in relation to education, subject and according to certain provisions. These provisions were: (sub-s. 1) that nothing in such law should prejudicially affect any right or privilege with respect to denominational schools which any class of person had by law in the Province at the Union; (sub-s. 2) all the powers, privileges and duties at the Union, conferred and imposed in Upper Canada on the separate schools and school trustees of the Queen's Roman Catholic subjects are extended to the dissentient schools of the Queen's Protestant and Roman Catholic subjects in Quebec (on this sub-section no question arises in the present appeal); and by sub-s. 3, as follows: "Where in any Province a system of separate or dissentient schools exists by law at the Union or is thereafter established by

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the legislature of the Province, an appeal shall lie to the Governor-General in Council from any Act or decision of any Provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education." The fourth sub-section enacts that if a Provincial law which seems to the Governor-General in Council requisite to give effect to his decision is not made or the decision is not executed, then the Parliament of Canada may make the necessary remedial law.

It will be observed that sub-s. 3 goes further than sub-s. 1 in material respects. In the first place, it applies not merely to what exists at the time of Confederation, but also to separate or dissentient schools established afterwards by Provincial legislatures. In the second place, the word "prejudicially," in sub-s. 1, is dropped out from before the expression "affecting," in sub-s. 3. In the third place, the right or privilege is not confined to one in respect of denominational schools, but is given in respect of education. Their Lordships think that these changes in language are significant. They show that the protection given by sub-s. 1 was deemed, if taken by itself, to be insufficient. It was not considered to be enough protection for the denominational schools to apply to them a restriction which only rendered ultra vires of the Provinces a law which took away what was an existing legal right or privilege at the time of Confederation in respect of denominational schools. Sub-s. 3 contemplates that within the powers of the Provincial legislature Acts might be passed which did affect rights and privileges of religious minorities in relation to education, and gives a different kind of remedy, which appears, as has already been pointed out, to have been devised subsequently to the Quebec resolutions of 1864, and before the bill of 1867 was agreed on. Whenever an Act or decision of a Provincial authority affecting any right or privilege of the minority, Protestant or Roman Catholic, in relation to education is challenged, an appeal is to lie to the Governor-General in Council, as distinguished from the Courts of law. No doubt if what is challenged is challenged on the ground of its being ultra vires, the right of appeal to a Court of law remains for both parties unimpaired. But there is a further right not based on the principle of ultra vires. That this is so is shown by the

extension of the power to challenge to any system of separate or dissentient schools established by law after Confederation, and which accordingly could not be confined to rights or privileges at the time of Confederation. The omission of the word "prejudicially" in sub-s. 3 tends to bear out the view that something wider than a mere question of legality was intended, and the language of sub-s. 4, enabling the Dominion Parliament to legislate remedially for giving effect, "so far only as the circumstances of each case require," to the decision of the Governor-General in Council, points to a similar interpretation. What is to be dealt with is a right or privilege in relation to education.

Their Lordships are of opinion that where the head of the executive in council in Canada is satisfied that injustice has been done by taking away a right or privilege which is other than a legal one from the Protestant or Roman Catholic minority in relation to education, he may interfere. The step is one from mere legality to administrative propriety, a totally different matter. But it may be that those who had to find a new constitution for Canada when the British North America Act was passed in 1867, came to the conclusion that a very difficult situation could be met in no other way than by transferring the question from the region of legality to that of administrative fairness.

There is no question before their Lordships in this case concerning any appeal to the Governor-General in Council, and they abstain from saying anything as to the principles on which, if invoked, he may think fit to proceed. But the view that the rights of the appellants are not necessarily confined to rights under sub-s. 1 has an important bearing on the construction of that sub-section, inasmuch as it no longer takes away all remedy in cases to which the principle of ultra vires does not apply. It may even be that the power conferred on the Governor-General in Council enables him to take into account the considerations arising out of what had been done in the course of de facto administration, which James L.J. excluded in delivering the judgment of the Judicial Committee in 1874, in *Maher v. Town of Portland*, reported in Wheeler's Confederation Law of Canada, and quoted by the late Lord Chancellor in delivering his recent judgment of the Committee in

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Hirsch v. Protestant School Commissioners of Montreal (1) on February 2 last. The question is one of administrative policy, and it is not before their Lordships. They desire, however, to observe that the view now expressed as to the relations of sub-ss. 1 and 3 of s. 93 is substantially the same as that taken in *Brophy v. Attorney-General of Manitoba*. (2) In that case the question arose under the Constitution Act of Manitoba, 1870, a Dominion Act under which, as subsequently confirmed by Imperial statute, Manitoba became one of the Provinces of the Dominion of Canada. The Act contains in s. 22 provisions which for present purposes are identical with those of sub-ss. 1, 3 and 4 of s. 93 of the British North America Act. It is true that in the second and corresponding sub-section of the Manitoba Act the appeal is expressly stated to lie against any Act or decision of the legislature of the Province as well as of any Provincial authority, thus in words saying more than in sub-s. 3 of s. 93 of the Act of 1867. But Lord Herschell in *Brophy's* case (3) expressed his dissent from the argument that the insertion of the additional words in the Manitoba Act showed that in the Act of 1867 it could not have been intended to comprehend the legislatures under the words "any Provincial authority." Their Lordships agree with his view, and they are of opinion that the legislatures are so comprehended. The point may prove to be one of great importance if there is hereafter an appeal to the Governor-General in Council. In *Brophy's* case the Roman Catholic minority in Manitoba appealed to the Governor-General in Council under sub-s. 2 of s. 22 of their Constitutional Act on the ground that rights and privileges of theirs in relation to education had been affected by two statutes of the legislature of Manitoba passed in 1890, which set up a general system of non-sectarian education. The schools of the Roman Catholic minority were deprived of their previously existing proportionate share of the money contributed for school purposes out of the taxes, while for the new non-sectarian schools they were both taxed and assessed for rates. It had been held, in *City of Winnipeg v. Barrett* (4), that the statutes of 1890 did not affect any right or privilege with respect to their schools which the Roman Catholics of Manitoba had

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(1) *Ante*, p. 200, 210. (A.C.)
(3) [1895] A.C. 221.

(2) [1895] A.C. 202.
(4) [1892] A.C. 445.

by law or practice in their Province at the Union in 1870. The only right or privilege which they then possessed was to establish and maintain for the use of members of their own Church such schools, at their own expense, as they pleased. In *Barrett's* case this was the only question before the Judicial Committee, and it was held that the Acts of 1890 were not ultra vires.

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But in *Brophy's* case the question was the wholly different one, whether the rights and privileges of Roman Catholics in relation to education had not been so affected by the Act of 1890 as to enable an appeal to the Governor-General in Council in a quasi administrative capacity. It was held that there was such affection, in fact although not in law, inasmuch as Roman Catholics were to be taxed and rated for the upkeep of schools which were obnoxious to their religious opinions in regard to education. It was no point of illegality. What was decided was that the Governor-General in Council had power to entertain such an appeal under sub-s. 2 of s. 22 of the Constitutional Act, corresponding, as their Lordships have already stated, to sub-s. 3 of s. 93 of the British North America Act, 1867.

Their Lordships have dwelt on what was decided in *Brophy's* case (1) in reference to the scope of the appeal against the affection of rights or privileges within the meaning of sub-s. 3 of s. 93 of the British North America Act, with a view to bringing out the limitation which has to be placed on the expressions used in sub-s. 1. The rights and privileges there referred to must be such as are given by law, and the redress which may be given in respect of prejudice to them, caused by laws made by the Provincial legislatures which, in other respects, have the exclusive power of legislation in relation to education, is a redress based on the principle of ultra vires. Such redress can therefore, for the reasons given in *Brophy's* case, be sought from the Courts of law alone. The other remedy which sub-ss. 3 and 4 afford not only supplements the former but affords cogent reason why sub-s. 1 should be construed as being confined strictly to questions of ultra vires. Were the Acts and regulations complained of in the petition of right assailable under this principle? In order to answer this question it is necessary to understand clearly what

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was their nature, and to understand this it is essential to see what has been the development of the system of education in Upper Canada.

Before 1867 there were in Canada schools of three principal classes—common schools, grammar schools and separate schools. Since Confederation there have come into existence continuation schools, collegiate institutes and high schools, which have developed out of the three kinds of school last mentioned. The claim of the appellants is that, in 1867, Roman Catholics in Upper Canada enjoyed by law the right to establish denominational schools, to be conducted by boards of trustees chosen by themselves; that, as regards selection of text-books and courses of study, the control of these belonged to the boards of trustees, who could sanction in their schools courses of study co-extensive in scope with those, since Confederation, pursued in high schools, collegiate institutions and continuation schools. The case made was that the trustees could do this in the separate schools, inasmuch as these, although common schools, were not under the old order of things, restricted in their scope as regards education of pupils up to twenty-one years of age. It is argued for the appellants that under s. 93, sub-s. 1, the Roman Catholics of Ontario continued to enjoy these autonomous rights, coupled with a consequential right of exemption from taxation for the purposes of the high schools, collegiate institutes and continuation schools, which, it is said, are mere forms of what fall within the scope of existing separate schools, and are, therefore, of a kind for which the Roman Catholics were exempt from taxation.

Their Lordships may say at once that if such a right was really conferred on the boards of separate schools, the right and the title to grants dependent on it were not interrupted by the Act of 1867. It was held by Rose J., who tried the case, and by the Appellate Division of Ontario, that the newly created Province of Ontario was not affected by any obligation in regard to this, and that the separate school trustees had consequently, after Confederation, no legal right to share in any appropriation or grants to be made by the new Province of Ontario for common school purposes. For this conclusion reliance was placed on s. 20 of the Separate Schools Act of the United Province of 1863, which enacts that “every separate school shall be entitled

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to a share in the fund annually granted by the legislature of *this Province* for the support of common schools, and shall be entitled also to a share in all other public grants, investments and allotments for common school purposes, now made or hereafter to be made by the Province of the municipal authorities, according," etc. The learned judges of the Appellate Court, who did not differ from the judgment of the first judge in the case, have held that the right granted by the Act of 1863 was confined to a right to a share of the grants made by the old United Province of Canada, and had no application to the new Ontario established at Confederation. It was true, they said, that under s. 129 of the British North America Act all laws in force in Canada at the Union were continued in Ontario as if the Union had not been made, but subject to repeal or alteration by Parliament or by the legislature of Ontario. They thought, however, that to enact that a law shall continue in force after the Union is not to declare that the meaning of that law shall be changed by the Union, and there was nothing to indicate that a law relating to distribution of moneys voted by the legislature of the old Province of Canada should govern legislation after the Union. The Act of 1863 might not be repealed, but the fund with which it dealt was no longer in existence.

The Supreme Court of Canada did not adopt this view. The Chief Justice of Canada emphatically dissented from it, and none of the other learned judges who sat with him, not even those who were in favour of approving the judgment, expressed themselves as differing from his dissent. The Chief Justice of Canada thought the conclusion reached below on this question to be at variance with the spirit and intent of s. 93, sub-s. 1, of the Act of 1867. Unless the legislatures of Ontario and Quebec were debarred from prejudicially affecting the rights and privileges which the religious minorities possessed in regard to their denominational schools in regard to maintenance and support, the protection given by the section would be illusory. On this point their Lordships are in full agreement with the Chief Justice of Canada. Sect. 93 was, in their view, obviously meant to apply to the future as well as to the past, and to the new Province of Ontario.

This consideration leads up to the crucial point in this appeal. Did the trustees of the separate Roman Catholic

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schools secure at Confederation a right to maintain, free from control or regulation by the legislature of Ontario, as respects the scope of instruction, denominational schools which could embrace the subjects formerly taught in the separate schools on their higher sides, and afterwards taught in the undenominational high schools, collegiate institutes and continuation schools, as developed after Confederation, or analogous subjects taught in the Roman Catholic separate schools before Confederation, and to exemption from taxation for the support of such undenominational educative organizations? And did the trustees secure a title to receive a share of every grant by the legislature for common school purposes, construed as extending to the maintenance of education of the type given in post-Confederation secondary schools, as well as in those that were merely elementary, based on the number of pupils attending the separate schools, and independent of the subjects taught, or the text-books used, every separate school being entitled to its share, calculated according to a statutory rate, however advanced, however rudimentary, the education and books might be? If these questions are answered in the affirmative then it was ultra vires of Ontario to take away the right either to regulate the schools in a manner inconsistent with this freedom, or to diminish the grants or to tax for the support of the undenominational schools, by legislation, or administratively, so far as control was concerned, by State regulation.

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The question is a very serious one. Before Confederation the common schools and with them the separate schools were left free, by statute (see Upper Canada Common Schools Act, 1859, s. 16), to educate pupils up to the age of twenty-one, and some of them were in the habit of giving to the older pupils advanced teaching such as would fit them to enter the University. But Roman Catholics find a great difficulty in sending their sons and daughters to the higher schools which have now been established for the purposes of this advanced teaching. As the Chief Justice of Canada has said, undenominational education is based on the idea that the separation of secular from religious education may be advantageous. But Roman Catholics, at least, hold that religious instruction and influence should always accompany secular training.

What, then, were the rights of the supporters of the separate schools at the time of Confederation? To answer this, and the question of ultra vires which arises out of it, it is necessary to look at the history of the development of education in Canada.

In the end of the eighteenth century there had been grants made for the establishment and support of schools for the children of the inhabitants of the Province of Upper Canada. These grants were at first grants of land, and the schools to be established were to be such as appear then to have been somewhat loosely called grammar schools. The schools were put on a statutory basis by an Act of the Legislative Council and Assembly of Upper Canada, passed in 1807, and were in that Act called "public schools," which were to be managed by trustees nominated for each school district. In 1816, under another Act, grants of money were made by the legislature for the benefit of the schools, which were in that Act and the subsequent Acts renamed common schools, and local boards of education were set up. The trustees were to manage the schools and make regulations for them, but they were to report every three months to the proper board as to the regulations and the books used in the schools, and the board was to control the regulations and the books.

By an Act of the Province in 1820, further moneys were granted from the taxes for the use of common schools, and by a later Act of 1824, still more money for the extension of moral and religious instruction, and for the development of the common schools, was directed to be applied. Yet further grants were made by a statute of 1833. By a later statute of 1839, provision was made for the assistance of a university college, as well as for the grammar schools which had grown up in the Province, and for the appropriation of the proceeds of land granted for their maintenance.

In 1840 an Imperial Act was passed uniting Upper and Lower Canada into a single Province of Canada, with one legislative Council and Assembly. Up to this date what had been established were common and grammar schools. They appear to have been undenominational, although provision was made for moral and religious instruction. In 1841 a change of policy was made, for in that year an Act was passed which not only provided for the further organization and endowment from provincial funds of the

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common schools, but enabled a superintendent of education to be appointed who was, among other things, to promote uniformity in the conduct of common schools throughout the Provinces. There were to be commissioners elected for each township and parish, who were to regulate the courses of study to be followed and the books to be used. The chief change in policy made by this Act was that where a body of the inhabitants of a township or parish dissented from the regulations of the commissioners, they could appoint trustees to take over the powers of common school commissioners and to establish and maintain common schools "in the manner and subject to the visitation, conditions, rules and obligations" provided for other common schools, and to receive a due proportion according to their number, of the moneys coming from taxes and rates for the support of common schools. By a later section the Governor was to appoint a board of examiners for each city and town corporate, one half of them to be Roman Catholics and the other half Protestants, each half to perform the duties in respect of the schools attended by children of its own religion.

Although the term "separate" is not in this Act applied to any school, it is plain that the Act initiated the principle of separate schools. And it is also plain that, so far as control by the State was concerned, the new separate schools were in all material respects under the same control as the ordinary common schools.

In 1843 the policy described was further extended. The supervision of education by the Government of the United Province was developed. The establishment of Protestant and Roman Catholic schools, with teachers of their respective persuasions, was again provided for, and such schools were in this Act described as "separate" schools. But all such "separate schools" were to be subject, by s. 56, to the visitations conditions, rules and obligations of common schools. Normal schools for the training of teachers, and model schools in which the principal teachers were to be certified by a normal school, were also provided for. In 1846 this Act was superseded by a new Common Schools Act. A superintendent of Schools for Upper Canada was to be appointed, whose powers extended, among other things, to the provision and recommendation of uniform and approved text-books in all the schools. There was to

be also a Board of Education for the Province. The limits of age for children attending the common schools were to be from four to sixteen. The principle of separate schools, with a right to receive a share of appropriations proportionate to the number of children attending the respective separate schools, was continued, and the separate schools were declared to be subject to the regulations obtaining with regard to other common schools.

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Their Lordships do not think that the statutes which were subsequently passed down to 1855 bear materially on the question before them. It is plain that the policy laid down from the commencement of the nineteenth century up to 1855 was to place all the common schools, including the separate schools, which were merely a special form of these, under ultimate State regulation. By the Grammar Schools Act of 1853 the instruction in a grammar school was to extend to the higher branches of practical English and commercial education, including the elements of natural philosophy and mechanics, and also to Latin, Greek and mathematics, so as to prepare students for University education. There was also provision for uniting some of the common schools with grammar schools, a provision which indicates that, subject to regulation, there was no very definite limitation imposed on what might be taught in a common school. The tendency of the legislature up to this point was to bring education in Upper Canada, subject to minor variations, into a single system.

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By 1855 the Roman Catholic population in Upper Canada had apparently increased in numbers and importance. For an Act was passed in that year, known as the Tache Act, which put the separate schools for Roman Catholics on a new footing. Meetings could be convened of persons desiring to establish separate schools, and they could select trustees, who became bodies corporate, and might become boards for the united separate schools of a city or town. The trustees were to have all the powers of rating and collection from persons sending children to their schools that the trustees of common schools had in respect of their schools. They were to be bound to perform all duties required of the latter, and their teachers were to be subject to similar regulations. The supporters of the separate schools were exempted from rates for future common schools and common school libraries. Each of the new separate schools

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was to be entitled to a share in the fund annually granted by the legislature for the support of the pupils attending it, proportionate to the average numbers attending it. The trustees were to report to the Chief Superintendent of Education as to the average attendance, and he was to determine the share of grants to be received.

Meantime, statutory grants were made for improving the position of the grammar, normal and model schools. In 1859 a Consolidating Act was passed by what had become the Legislative Council and Assembly for the now United Province of Canada. This Act related to common schools. It did not make any important changes in the law, but aimed, for the most part, at bringing together the existing statutory provisions relating to common schools. Many of the provisions of this Act were embodied by reference in the Act respecting separate schools passed in the same years as stated below. The office of Chief Superintendent of Education was reconstituted. He was to be under the direction of the Governor. The duty of the Chief Superintendent under the General Consolidating Act now cited was among other things, under s. 106, to apportion in each year "all monies granted or provided by the legislature for the support of common schools in Upper Canada, and not otherwise appropriated by law, to the several counties, townships, cities, &c.," according to ratio of population.

There was also to be a Council of Public Instruction of nine persons, appointed by the Governor. Among other things it was to make regulations for the organization, government and discipline of common schools, for the classification of schools and teachers, and for school libraries, and to examine, and at its discretion to recommend or disapprove of text-books for the use of schools or school libraries. By s. 120 the Governor could authorize the expenditure, in Upper Canada, out of the share of the legislative school grant and the additional moneys granted in aid of common and grammar schools "and not otherwise expressly appropriated by law" of certain sums for purposes which were not connected with the separate schools. By s. 121, the whole of the remainder of the grants mentioned in s. 120 and not exclusively appropriated in its sub-sections, were to be expended in aid of the common schools according to

the provisions of the Act. There was a conscience section (129) in the Act.

In the same year (1859) the Separate Schools Act, already referred to, was passed. The main provisions of the Common Schools Act of 1859 were thereby made applicable to the separate schools, but the new Act was designed in sub-ss. 18 to 36 to make clear what was the position in particular of Roman Catholic separate schools. The existing provisions for these were repeated with variations, and it was enacted that the trustees of each separate school should perform the same duties and be subject to the same penalties as trustees of common schools. By s. 33 every separate school was again to be entitled to a proportionate share in the annual grant for common schools. The trustees were to report the names and attendance of the children attending these schools to the Chief Superintendent, who was thereupon to determine what they were entitled to receive out of the legislative grant.

It is now necessary to refer to the final Separate Schools Act, passed in 1863, which substituted a new set of provisions in the Act of 1859, in place of ss. 18 to 36, which were by this Act repealed. Amongst those new provisions was s. 20, a re-enactment with additions of the old s. 33 of the Act of 1859; and a section which their Lordships set out later in their judgment.

The appellants contend that the words in s. 106 of the Common Schools Act of 1859 "not otherwise appropriated by law" includes the share of the apportioned fund to which they are entitled under s. 20 of the Act of 1863, and shows that they are not excluded from sharing in all the moneys appropriated outside those "granted or provided by the legislature for the support of common schools." But their Lordships think that this is erroneous and that the learned judges were right who thought that the separate schools are only entitled to share in the moneys "granted by the legislature for the support of common schools not otherwise appropriated by law," and also by the Act of 1863 in all other public grants made for common school purposes. The appropriations form in short a first debit item against the money grant. After that, after the appropriations have been made and the debit item satisfied, comes the second stage—namely, that of apportionment; and it is in this apportionment that the separate schools

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have their share. The apportionment mentioned in s. 106, sub-s. 2, is not that of the total fund, but only of that fund after the trustees of the separate schools had received their share. This their Lordships regard as the true meaning of the Act.

This statute of 1863 is an important one. Its declared purpose was to restore to Roman Catholics in Upper Canada certain rights in respect of separate schools, and to bring the law respecting separate schools more into harmony with the law respecting common schools. It was in force at Confederation, and it has been spoken of as the charter of the denominational schools. The chief points in it were that separate school sections, whether in the same or in adjoining municipalities (not only, as in the earlier Act, the schools in one ward of a city or town), might be joined in a separate school union section. The teachers of separate schools were to be subject to the same examinations, and to receive certificates of qualification in the same way as common school teachers generally. Supporters of separate schools were to be exempt from payment of municipal rates for common schools and libraries, while they continued to be supporters of separate schools, and not merely for the current year, as under the old legislation. The Roman Catholic separate schools were to be subject to such inspection as might be directed by the Chief Superintendent of Education, and were to be subject also to such regulations as might be imposed from time to time by the Council of Public Instruction for Upper Canada. All judges, members of the legislature, heads of local municipal bodies, the Chief Superintendent and the local superintendent of common schools, and clergymen of the Roman Church, were to be visitors of these separate schools.

Sect. 20 is a section to which much of the argument at their Lordships' bar was directed. It is in these terms: "Every separate school shall be entitled to a share in the fund annually granted by the legislature of this Province for the support of common schools, and shall be entitled also to a share in all other public grants, investments and allotments for common school purposes now made or hereafter to be made by the Province or the municipal authorities, according to the average number of pupils attending such school during the twelve next preceding months, or during the number of months which may have

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elapsed from the establishment of a new separate school, as compared with the whole average number of pupils attending school in the same city, town, village or township."

By s. 21, local assessments for common school purposes were excluded from the money to which the separate schools were to be entitled. By s. 26 the Roman Catholic separate schools were to be subject to such inspection as might be directed from time to time by the Chief Superintendent and were to be "subject also to such regulations as might be imposed from time to time by the Council of Public Instruction for Upper Canada."

The questions which arise on this Act are, first of all, whether, having regard to the provisions quoted, laws have been enacted by the Province which prejudicially affect any legal right or privilege with respect to denominational schools which the Roman Catholic community (a class of persons) had obtained under these statutes at the Union. The second question is whether under these statutes the Roman Catholic schools had become entitled at the Union to grants which were fixed and could not be taken away or interfered with by the authorities of the Province. It has been to render the nature of these questions clear that their Lordships have considered it necessary to examine at some length the history and character of the legislation before Confederation.

The petition of right claims that the suppliants have a legal title to establish and conduct courses of study, with grades of education, such as are now conducted in what are designated as continuation schools, collegiate institutes, and high schools, and that any statutes and regulations purporting to limit or prejudicially affect this title are ultra vires. The petition further claims that the class of persons represented by the petitioners are exempt from payment of rates imposed for the support of these organizations when not established by trustees of Roman Catholic separate schools. Consequentially on their claim the petitioners ask that the trustees of the Roman Catholic separate schools for section 2, Township of Tiny, may have paid to them certain moneys to which it is said that they would have been entitled on the footing that the general claim as to validity is properly established.

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The appellants say that the old common schools were allowed to give such education as was found suitable to pupils up to twenty-one, who were thereby prepared for the University, and that the separate schools enjoyed the right thus permitted, and possessed it at Confederation. For this purpose the classes in the schools were in point of fact "graded." The Courts of Ontario have held in the present case that while this grading was de facto permitted it was always subject to the regulations by which the State authorities might from time to time alter and define the work in the common (including the separate) schools. Subject to this supervision, "grading" might take place either in the classes of a single school, or by distributing the teaching where there was a group of schools, as in urban municipalities. It is said for the appellants that the only rival of the common and separate schools as they were up to and after Confederation, was the grammar school, which was not under the common school Acts, but was always organized under separate statutes. The appellants further argued that an Act passed after Confederation in Ontario in 1871 for the improvement of the common and grammar schools really transformed both the common and the grammar schools. They were rearranged in two divisions, in one of which free education was to be given up to the age of twelve, such division to be called a "public school." The other division was to be a "high school," and to give higher instruction with the aid of the old grammar school grant, and of contributions from local revenues by the municipal authorities. The Boards of grammar school trustees were to take over these high schools, and to administer them under regulation.

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The appellants contend that the common school was at the Union entitled to provide for the public, other than separate school supporters, education of every kind which in the judgment of its trustees it was desirable to give, and that some of the urban common schools were then known as high schools, in which the teaching extended as far as that in the grammar schools, and was substantially that prescribed for the new high schools after the Act of 1871. The new public and high schools were, it is argued, just divisions of pre-Confederation common schools, with compulsory taxation for the new high schools. From such taxation, it is said, the Roman Catholic separate school

supporters must be exempt, and they cannot be affected by the combination brought about by the Act of 1871.

Of the post-Confederation continuation schools, which were established by statutes of 1896 and 1908, it is said that these began by being only continuation classes in public schools in municipalities in which no high school had been established, but were by the Act of 1908 made into continuation schools supported by grants and rates. In any view, as they cannot be given the form of separate schools, Roman Catholics should be free from taxation for them. Of collegiate institutes, it is said that they are only certain high schools to which a special name has been given.

The petition also claims that certain sections in various statutes which infringe the principles thus contended for are ultra vires.

The Provincial Legislature is supreme in matters of education, excepting so far as s. 93 of the British North America Act restricts its authority. Sub-s. 1 preserves as they stood any rights and the privileges given in relation to denominational schools by law in 1867. The question, therefore, is whether the Province could then as the law stood so control the courses of study and the general range and quality of the text-books used, as to enable the educational authorities of the Province to prescribe the gradation of the separate school and the stages in which instruction should be given in it. Examination of the statutes and of the history of the subject has satisfied their Lordships that, while a settlement was come to in 1863 with both Roman Catholics and Protestants, a settlement which in so far as it remained unaltered at Confederation, must be strictly maintained, the Province showed in the wording of the successive earlier statutes the intention to preserve for the rest the power to mould the educational system in the interests of the public at large, as distinguished from any section of it, however important. This consideration does not relieve a Court of law from the obligation to confine itself strictly to the meaning of the words which define the legal rights, but it must be borne in mind in the interpretation of the language relating to regulation.

The examination of the series of statutes relating to education from 1807 onwards has led their Lordships to

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the view that the Province did provide for the regulation, in the full sense, of its common or public schools. It is not necessary to repeat the citations which have already been made. It is sufficient, for showing what regulation means, to refer to s. 6 of the Act of 1816, which delegated to the trustees of the common schools the power to make rules and regulations for their good government, the condition of the schools to be reported to the Board of Education, with the branches taught, the state of education, the number of the scholars, and things that might benefit the schools directed by the trustees. The Board was to have power to superintend these common schools and to make reports to the Governor, which should be laid before the legislature. This policy was maintained through the Acts which followed. In 1841 a Superintendent of Education for the Province was appointed to visit the schools and apportion the moneys voted. Common School Commissioners were set up for the various districts, with instructions to regulate for each school the course of study to be followed in it, and to establish general rules for the conduct of the school, to be communicated to the teachers. There were also to be appointed by the Governor boards of examiners (half to be Protestant and half to be Roman Catholic) to examine persons recommended as teachers, and to regulate for each school separately the course of study to be followed, the books to be used, and the general rules for the conduct of the schools. The Act of 1841 enabled, indeed, dissentient inhabitants to call for separate common schools and to appoint their own trustees, but these schools were to be subject to the "visitation, conditions, rules, obligations and liabilities" of ordinary common schools. This provision was repeated in the Act relating to common schools of 1843 (s. 56) and in the Act of 1846 (s. 33). In the Act of 1850 it is expressly provided (s. 19) that the separate schools are to be under the same regulations as to the persons for whom the school is permitted to be established as common schools generally, and by s. 9 of the Separate Schools Act of 1863 it is provided that the trustees of separate schools are to perform the same duties and be subject to the same penalties as the trustees of common schools. Sect. 26 subjects these schools to such inspection as the Chief Superintendent may direct, and

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also to such regulation as the Council of Public Instruction may impose.

It is this principle and purpose which appear to their Lordships to be dominant through the statutes, and the language used in the sections just quoted has brought this Committee to the conclusion that the power of regulation must be interpreted in a wider sense than that given to it in the judgment of the Chief Justice of Canada. They are not at one with him in thinking that separate school trustees could give secondary education in their schools otherwise than by the permission, express or implied, of the Council of Public Instruction. The separate school was only a special form of common school, and the Council could in the case of each determine the courses to be pursued and the extent of the education to be imparted. A full power of regulation, such as the purpose of the statutes quoted renders appropriate, is what suggests itself, and this is the natural outcome of a scheme which never appears to have really varied. Such expressions as "organization," "government," "discipline" and "classification," do, in their Lordships' interpretation of them, imply a real control of the separate schools. The duty of the Judicial Committee is simply to interpret the words used. It may be that even if the contention of the appellants as to the scope of sub-s. 1 is shut out, there will remain to them a remedy of a wholly different kind in the shape of an appeal under sub-s. 3 to the Governor-General in Council in an administrative capacity. That question does not arise in this appeal and is in no way prejudiced by the conclusion to which their Lordships have come.

What has been said on the subject of ultra vires in regard to regulation also applies to the title to fixed grants. The appellants rely on s. 20 of the Separate Schools Act of 1863, a section which has been already quoted. It declares every separate school to be entitled to a share in the fund annually granted by the legislature for the support of common schools, and also to a share in all other public grants, investments and allotments for common school purposes, according to a defined proportion. It is argued that their share of these grants is being withheld from the appellants and from the Roman Catholic separate schools generally. But the question really turns on whether the authorities of the Province had power to make apportionments and payments

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out of the funds granted before the balance was arrived at which should be available for common school purposes. In their Lordships' opinion it is clear that there was such power. Sect. 106 of the Common School Act of 1859 defined as the duty of the Chief Superintendent to apportion the moneys granted or provided by the legislature "and not otherwise appropriated by law" in a manner analogous to that subsequently provided by s. 20 of the Act of 1863. Sect. 120 of the 1859 Act enabled the Governor to make a number of appropriations out of the sums granted, and s. 121 provides that the whole of the remainder of the grants mentioned and not exclusively appropriated in the earlier sub-sections are to be expended in aid of the common schools according to the provisions of the Act.

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In their Lordships' view, in the face of the provisions referred to, it is impossible to contend successfully that it was ultra vires after Confederation to make new appropriations out of the grants which would diminish what would otherwise have come to the appellants. Whether the case is looked at from the point of view of regulation, or whether it is regarded from that of discretion in power of appropriation, the result is the same. It is indeed true that power to regulate merely does not imply a power to abolish. But the controversy with which this Board has to deal on the present occasion is a long way from abolition. It may be that the new laws will hamper the freedom of the Roman Catholics in their denominational schools. They may conceivably be or have been subjected to injustice of a kind that they can submit to the Governor-General in Council, and through him to the Parliament of Canada. But they are still left with separate schools, which are none the less actual because the liberty of giving secondary and higher education in them may be abridged by regulation. Such an abridgment may be in the usual course when a national system of education has attained a certain stage in its development, and it would be difficult to forgo this power if the grading which may be essential is also to be possible. Their Lordships do not think grading is in itself inconsistent with such rights to separation of schools as were reserved at Confederation.

Copious reference has been made in the argument to the reports, circulars and instructions which were issued with reference to educational administration by the Chief

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Superintendent and other officials, from time to time, before Confederation. These documents are not relevant in construing s. 93, but they do show what the administrative system was, and as doing so, they have been legitimately referred to. In the report in 1846, Dr. Ryerson, who was then Assistant Superintendent and shortly afterwards became Chief Superintendent, gave his first account of the system which was being progressively built up. He laid stress on the control of text-books and on the provision of normal schools in which to train teachers. His activities, and the work of those who were setting themselves to the same task of developing the administrative side of the education problem, are fully summarized in the elaborate judgment of Rose J., who tried the case. While their Lordships do not agree with that learned judge in the view, taken by himself and the other Ontario judges, that there was no Province of Canada after 1867 to which the principle of ultra vires applied, they observe the thoroughness of his judgment in other respects and the way in which he has covered in detail the field of controversy. He devoted much of his judgment to pointing out that the real question is whether the legislation subsequent to 1871 has prejudicially affected the appellants' rights, first, by depriving separate school supporters of the power to conduct such schools as were actually being conducted at Confederation by common school trustees in certain localities, and secondly, by making separate school supporters liable for rates for the support of schools which have been set up to do some of the work which separate schools had a legal right to do.

It is a satisfaction to have had the advantage in a case so important and complicated as this, of judgments so thorough and exhaustive as these, both in the Supreme Court of Canada and in the Ontario Courts.

For reasons which now sufficiently appear, their Lordships will humbly advise His Majesty that this appeal should be dismissed. There will be no order as to costs.

Solicitors for appellants: *Lawrence Jones & Co.*

Solicitors for respondents: *Blake & Redden.*

[PRIVY COUNCIL.]

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| J.C.* 1928 Dec. 10. 1929 A.C. p. 260. | ATTORNEY-GENERAL FOR MANITOBA AND ANOTHER..... | } APPELLANTS; |
| | AND | |
| | ATTORNEY-GENERAL FOR CANADA..... | } RESPONDENT. |
| | ATTORNEY-GENERAL FOR ONTARIO..... | |
| | | } INTERVENER. |

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Canada (Manitoba)—Legislative Power—Dominion Companies—Provincial Act affecting Capacity of Dominion Companies—Sale of Shares Act (C. A. Man., 1924, c. 175)—Municipal and Public Utility Board Act (Man., 1926, c. 33)—British North America Act, 1867 (30 & 31 Vict. c. 3), ss. 91, 92.

The Sale of Shares Act, 1924, and the Municipal and Public Utility Board Act, 1926, both of Manitoba, are ultra vires under the British North America Act, 1867, s. 92, in so far as they purport to prohibit Dominion companies from selling their own shares within the Province without the consent of a Provincial Commissioner or Board, since thereby they interfere, directly and substantially, with the status and capacity conferred on the companies by Dominion legislation intra vires under s. 91.

John Deere Plow Co. v. Wharton [1915] A.C. 330 and *Great West Saddlery Co. v. The King* [1921] 2 A.C. 91 applied.

Lukey v. Ruthenian Farmers' Elevator Co. [1924] S.C.R. 56 approved.

Judgment of the Court of Appeal for Manitoba 36 Man. L.R. 583 affirmed.

APPEAL (No. 125 of 1927) from a judgment of the Court of Appeal for Manitoba (June 6, 1927) answering questions referred to that Court under R.S. Man. 1913, c. 38.

The questions referred were whether two Acts of the Manitoba legislature—namely, the Sale of Shares Act (Consolidated Amendments, 1924, c. 175) and the Municipal and Public Utility Board Act (Stat. of Man. 1926, c. 33)—were intra vires in so far as they purported to apply to the sale of its own shares by a Dominion company.

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p. 261. The material provisions of the Acts in question appear from the judgment of the Judicial Committee.

The Court of Appeal, following *Lukey v. Ruthenian Farmers' Elevator Co.* (1), answered “no” as to each of the Acts. The judgment is reported at 36 Man. L.R. 583.

* Present: LORD HAILSHAM L.C., VISCOUNT DUNEDIN, VISCOUNT SUMNER, LORD ATKIN, and CHIEF JUSTICE ANGLIN.

1928. July 16, 17, 19. *R. W. Craig K.C.* (*Attorney-General for Manitoba*) and *Frank Gahan* for the appellants; *E. Bayley K.C.* for the Attorney-General for Ontario, intervener. The Acts were wholly within the legislative power of the Province under the British North America Act, 1867, s. 92, heads 16 (local and private matters), 13 (property and civil rights), 9 (licences). The subject-matter was not within any of the enumerated heads under s. 91; it is well settled that head 2 (trade and commerce) should be given a very limited interpretation. The decisions of the Board in *John Deere Plow Co. v. Wharton* (1) and *Great West Saddlery Co. v. The King* (2) are distinguishable, since the Acts now in question do not discriminate between Dominion companies and Provincial companies. The judgments in both cases recognize the power of a Province to make laws of general application affecting the civil rights of a Dominion company. The limitation upon that power is stated in the former of those judgments as follows (3): "The status and powers of a Dominion company as such cannot be destroyed by Provincial legislation." A consideration of the provisions of the Acts now in question shows that they had not that effect. [In addition to cases mentioned in the judgment reference was made to *Attorney-General for Canada v. Attorney-General for Alberta* (4) and *Toronto Electric Commissioners v. Snider*. (5)]

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Cannon K.C. (*Solicitor-General for Canada*) and *Geoffrion K.C.* for the respondent. Upon the principles laid down in *John Deere Plow Co. v. Wharton* (1) and *Great West Saddlery Co. v. The King* (2) the two Acts were ultra vires in so far as they purported to preclude Dominion companies from selling their shares in the Province. The Acts thereby interfered directly with the status and capacity validly conferred upon Dominion companies by the Dominion Companies Act (R.S. Can. 1914, c. 79), ss. 28, 31, 32, 44, 51, 53, 58, 75, 84. The Acts in question were in their substance Acts dealing with companies, not Acts as to licences, or civil rights, or local matters. Provisions similar to those in the Acts could have been introduced into the Dominion Companies Act if the Dominion legislature had seen fit. [Reference was made to *Dobie v. Temporalities Board* (6);

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(1) [1915] A.C. 330.

(2) [1921] 2 A.C. 91.

(3) [1915] A.C. 330, 341.

(4) [1916] 1 A.C. 588, 595, 596.

(5) [1925] A.C. 396, 409.

(6) (1882) 7 App. Cas. 136.

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La Compagnie Hydraulique v. Continental Heat and Light Co. (1); *Attorney-General for Ontario v. Reciprocal Insurers.* (2)].

R. W. Craig K.C. replied.

Dec. 10. The judgment of their Lordships was delivered by

VISCOUNT SUMNER. By Order in Council dated June 4, 1927, two questions were referred to the Court of Appeal for Manitoba for hearing and consideration, and in due course the Court of Appeal, following the decision of the Supreme Court of Canada in *Lukey v. Ruthenian Farmers' Elevator Co.* (3), returned the answer "No" to both questions, but gave leave to appeal to His Majesty in Council. In effect, therefore, the present appeal, brought pursuant to that leave, is an appeal against the decision above mentioned.

The questions were: (1.) Are the provisions of the Sale of Shares Act of Manitoba, being c. 175 of the consolidated amendments, 1924, intra vires of the Provincial legislature in so far as they purport to apply to the sale of its own shares by a Dominion company?

(2.) Assuming that the Municipal and Public Utility Board Act of Manitoba, being c. 33 of the 1926 statutes of Manitoba, has been duly brought into force by proclamation of the Lieutenant-Governor, are the provisions of the said c. 33 intra vires of the Provincial legislature in so far as they purport to apply to the sale of its own shares by a Dominion company?

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The statutes in question have to be considered as a whole, and with the assistance of counsel their Lordships have gone through the sections in detail, but those on which the questions referred specially depend are ss. 4 to 13 inclusive of the earlier and ss. 162 to 165 inclusive of the later Act. Their effect may be sufficiently summarized as follows:—

Under the Sale of Shares Act no company, however or wherever incorporated, might sell or offer to sell or try to sell in Manitoba any shares, stocks, bonds or other securities of any company (with exceptions not for present purposes material) without first obtaining from the Public Utility

(1) [1909] A.C. 194.

(2) [1924] A.C. 328, 347.

(3) [1924] S.C.R. 56.

Commissioners a certificate and a licence. It was common ground that the word "sell" in both Acts included, along with sales in the stricter sense of the word, subscriptions and applications by members of the public for shares in a company or securities created and issued by a company, and allotment of such shares or securities in accordance with the applications, so as thereby to make the allottees corporators or secured creditors of the company. In order to obtain the requisite permission to sell, the company was required to file with the Commissioner a statement, showing in detail the plan on which it proposed to transact business, a copy of all contracts and instruments to be entered into between itself and its contributors, a statement showing its name and location, and an itemised account of its actual financial condition and the amount of its property and liabilities, and such other information touching its affairs as the Commissioner might require, with certain other documents relating to the law governing its incorporation in the case of a company not organized under the laws of Manitoba. The Commissioner was thereupon to examine these materials, and if in his judgment the company satisfied him with regard to the above mentioned matters, he was to grant the certificate and permission required; in the contrary event he might require the company to make such alterations in its articles, contracts and plan of business as in his judgment might be necessary, and until he was satisfied in these respects his permission was to be withheld.

Turning to the later Act, the Municipal and Public Utility Board Act, 1926, which repeals the previous Sale of Shares Act and takes its place, it is to be observed that the duties of the Commissioner are now to be discharged by a Board, called the Municipal and Public Utility Board, an incorporated body, consisting of a chairman and two other members. The Board acts with more publicity, more formality, and more resemblance to the proceedings of a court of law than the Commissioner under the earlier statute and, so far as the present matter is concerned, its conclusions are open to review by the Court of Appeal on any point of law or on any question affecting the jurisdiction of the Board, but its powers and functions do not appear to differ for present purposes from those of the Commissioner.

Sect. 162 provides as follows: "No person, firm, or corporation shall sell, or offer or agree to sell, or directly or

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indirectly attempt to sell in Manitoba, any shares, stocks, bonds or other securities of or issued by any company, unless the company has first been approved by the Board as one the securities of which are permitted to be sold in Manitoba and a certificate to that effect issued by the Board."

There follow elaborate provisions under which the Board is enabled, as the Commissioner had been, to arrive at a decision, favourable or unfavourable to the company's application for the required permission, and in either case, subject always to the above appeal, its decision is final.

It will thus be seen that, under requirements made in their discretion by the Commissioner or the Board, the exercise of powers expressly given to the company might be forbidden and compliance with statutory obligations prevented, such as sales of the company's shares, directed in terms by the Dominion Companies Act, s. 58, sub-s. 2, or permitted in specific cases, s. 75, or generally for the company's purposes, s. 84 (c), and conclusions, duly arrived at by the competent Dominion Minister, might in effect be overridden or set aside by the Provincial Commissioner or the Board. The company might be prevented from having the benefit attaching to compliance with s. 28, and so eventually forfeit its Dominion incorporation, s. 29, and in general it could only launch its enterprise subject to provincial and non-Dominion requirements.

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In the case of a company, incorporated for purposes not wholly Provincial and under the powers of legislation of the Dominion of Canada, their Lordships cannot doubt that the Provincial legislation above summarized interferes, directly and not merely incidentally, in material respects and to a substantial extent, with the capacity of the company to raise capital, as and when its directors may deem it necessary to do so in accordance with its articles and the provisions of the Dominion Companies Act, and so derogates from its status and consequent capacities as a Dominion company.

Their Lordships were informed, and the Acts clearly bear it out, that among the objects with which this legislation was framed was the protection of inexperienced residents in the Province from the temptation to participate in enterprises ill-designed, ill-equipped, and ill-conducted,

and from consequent losses of their savings and disappointment of their hopes. The subject was one well worthy of the attention and care of statesmen and, it may be, was peculiarly within the domain of Provincial regulation; the method adopted was that of prevention, instead of or in addition to such cure as criminal prosecution and punishment can afford. They do not doubt that the Commissioner under the one Act and the Board under the other have performed their duties with care and discretion and have been selected for their experience and judgment in the kind of matters with which they deal. They think it probable that the risk of any substantial errors of judgment on their part is small and that none but unmeritorious companies need find the requirements burdensome, the delay prejudicial, or the result a matter of anxiety or loss. It is further the case that there is no discrimination against Dominion companies as such, since all companies are included in the legislation; that companies, which can sell their shares or securities in other Provinces or abroad or can borrow without security or raise additional funds by capitalizing undistributed profits, are at liberty to do so; further, by s. 6 of the first Act and by s. 160 (i.) (g) of the second, it is permissible to them to sell their shares or securities in the Province without licence from the executive, provided that such sale or attempt to sell is not "made in the course of continued or successive acts" or "transactions of a like character." This last provision appears to be of slight value. Substantially, if capital is to be raised it must either be raised by "selling" the securities issued piecemeal in a succession of transactions to separate purchasers and allottees, or by disposing of the whole issue to some financial house in one transaction. This alternative may not be feasible at all, but even if it were, as the purchasing house in its turn could only dispose of its investment to the public by successive sales to or transactions with the public, which would come under the Acts, the fetter on the financial autonomy of the Dominion company would operate although at one remove, and would interfere with its essential powers in the same way though possibly in a somewhat different degree. It is sufficient to add that, although ss. 174, 178 and 193 of the Act of 1926 may mitigate the effect of the prior legislation, they do not remove the flaw in its validity, which s. 162 preserves.

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The general effect of these provisions remains. An artificial person, incorporated under the powers of the Dominion with certain objects, invested by these powers with capacities to trade in pursuit of those objects and with the status and capacities of a Dominion incorporation, is under these Acts liable in the most ordinary course of business to be stillborn from the moment of incorporation, sterilized in all its functions and activities, thwarted and interfered with in its first and essential endeavours to enter on the beneficial and active employment of its powers, by the necessity of applying to a Provincial executive for permission to begin to act and to raise its necessary capital, a permission which may be subjected to conditions or refused altogether according to the view, which in their discretion that executive may take of the plans, promises and prospects of a creation of the Dominion. The question is whether legislation, which must in many cases have this effect, even though not in all, is *intra vires* the legislature of Manitoba. It appears to admit of only one answer in view of what is now settled law with regard to the effect of ss. 91 and 92 of the British North America Act on this class of legislation.

The case was argued with much learning and resource, partly on the construction of ss. 91 and 92, partly on the decisions of the Supreme Court of Canada and of their Lordships' Board. It was said that no more was claimed for the powers of the Provincial legislature than was clearly within its powers in the case of a natural person; that a decision adverse to the validity of these statutes would enable any group of men, who wished to escape Provincial prohibitions, which bound them as natural persons, to incorporate themselves as a Dominion company and thus defy the Provincial legislation; that power to invest an incorporated entity with capacities is quite distinct from authority for their unrestricted exercise; and that Dominion powers should not be interpreted so as to give protection to fraud. The ultimate authority after all is the British North America Act, and its construction is in this connection no longer in doubt. These and analogous contentions have been so often canvassed and decided that no good purpose can be served by a re-examination of them. As a matter of construction it is now well settled that, in the case of a company incorporated by Dominion authority

with power to carry on its affairs in the Provinces generally, it is not competent to the legislatures of those Provinces so to legislate as to impair the status and essential capacities of the company in a substantial degree. The reasoning, by which this result has been arrived at, has been most fully developed in the judgments of the Board in *John Deere Plow Co. v. Wharton* (1) and *Great West Saddlery Co. v. The King*. (2) In their Lordships' view the statutes now under consideration do so impair the status and powers of such a company, and accordingly decisions as to property and civil rights like *Cizitens' Insurance Co. v. Parsons* (3) and *Colonial Building and Investment Association v. Attorney-General of Quebec* (4), or as to local taxation like *Bank of Toronto v. Lambe* (5), or as to local regulations of the liquor traffic or other similar matters, like *Attorney-General for Ontario v. Attorney-General of Canada* (6), and case of the *Attorney-General for Manitoba v. Manitoba Licence Holders' Association* (7), do not govern the present case.

This is not a mere case of fixing the conditions of local trade or of regulating the form or the formalities of the contracts, under which business is to be carried on within the Province, or of prescribing the restrictions under which property within the Province can be acquired, nor is it a mere matter of local police regulations, or local administration, or raising of local revenue, or a mere means of attaining some exclusively Provincial object. The capacity of a Dominion company to obtain capital by the subscription, or so called sale, of its shares, is essential in a sense, in which holding particular kinds of property in a Province or selling particular commodities, subject to Provincial conditions or regulations, is not. Neither is the legislation which is in question saved by the fact, that all kinds of companies are aimed at and that there is no special discrimination against Dominion companies. The matter depends upon the effect of the legislation not upon its purpose. Again, with regard to the later Act, passed after, and no doubt in view of, *Lukey v. Ruthenian Farmers' Elevator Co.* (8), in their Lordships' view the objections

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- (1) [1915] A.C. 330.
- (2) [1921] 2 A.C. 91.
- (3) (1881) 7 App. Cas. 96.
- (4) (1883) 9 App. Cas. 157.

- (5) (1887) 12 App. Cas. 575.
- (6) [1896] A.C. 348.
- (7) [1902] A.C. 73.
- (8) [1924] S.C.R. 56.

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arising under the earlier Act are not met by the provisions, which operate on natural persons within the Province, with or through whom the Dominion company will require to deal; for the object and effect are the same, and it is not permissible to do indirectly what cannot be done directly.

Their Lordships are so sensible of the difficulties in which the Provincial legislatures may find themselves placed in such matters as this, and so anxious not to appear to say anything that might restrict their authority in any case distinguishable from the present, that they refrain from resting their decision upon any other feature in the Acts under discussion than the interference with the status of a company incorporated under Dominion laws, such as they have mentioned.

Their Lordships are of opinion that the Court of Appeal for Manitoba rightly answered the questions referred to them, and that their decision ought to be affirmed, and so they will humbly advise His Majesty.

Solicitors for appellants: *Blake & Redden.*

Solicitors for respondents: *Charles Russell & Co.*

Solicitors for intervener: *Freshfields, Leese & Munns.*

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RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Legislative Authority—Fisheries—Fish Canneries—Construction of Fishing Regulations—Whether power to grant licences discretionary—Fisheries Act, 1914 (4 & 5 Geo. 5, c. 8, Can.), ss. 7A, 18—British North America Act, 1867 (30 & 31 Vict. c. 3), ss. 91, 92.

Sects. 7A and 18 of the Fisheries Act, 1914, of Canada, as amended, which provide that no one shall operate for commercial purposes a fish cannery, or in British Columbia a salmon cannery or curing establishment, without a licence from the Minister of Marine and Fisheries, are ultra vires the Parliament of Canada. The sections purport to confer upon the Minister powers which fall under s. 92, head 13 (property and civil rights in the Provinces) of the British North America Act, 1867, and are not directly or incidentally within s. 91, head 12 (sea coast and inland fisheries), or any other enumeration in s. 91. The fact that Canadian fishery legislation before 1867 had dealt with similar matters is not a ground for putting an unnatural construction upon the words of s. 91, head 12.

Four propositions relative to legislative competence in Canada stated as being established by decisions of the Judicial Committee.

The special fishery regulations for British Columbia, made under s. 45 of the Fisheries Act, 1914, do not expressly or by implication give the Minister discretion to withhold a licence to fish from an applicant thereby qualified, and the Minister therefore has not that discretion.

Judgment of the Supreme Court of Canada [1928] S.C.R. 457 affirmed.

APPEAL (No. 73 of 1928) by special leave from a judgment of the Supreme Court of Canada, dated May 28, 1928, answering questions referred to that Court by the Governor General under s. 60 of the Supreme Court Act of Canada.

The three questions referred are set out in the judgment of the Judicial Committee. They were shortly: (1.) whether

*Present:—LORD SANKEY L.C., LORD DARLING, LORD TOMLIN, LORD THANKERTON, and SIR LANCELOT SANDERSON.

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ss. 7A and 18 of the Fisheries Act, 1914, of Canada (being 4 & 5 Geo. 5, c. 8, as amended), were ultra vires in whole or in part; (2.) a question as to the effect of the sections, if valid; (3.) whether in the case of licences required by certain Special Fishery Regulations for British Columbia (made under s. 45 of the above Act) and those required by ss. 7A and 18 (if valid), the Minister had a discretion to grant or refuse an application.

Sects. 7A and 18 are also set out in the present judgment. They provided that no one should operate for commercial purposes a fish cannery (s. 7A), or in British Columbia a salmon cannery or curing establishment (s. 18), without a licence from the Minister of Marine and Fisheries. The fee prescribed by s. 7A for an annual licence was one dollar; the fees under s. 18 were substantial in amount and dependent upon the quantity of salmon dealt with.

The Supreme Court of Canada (Anglin C.J. and Duff, Mignault, Newcombe, Rinfret, Lamont and Smith JJ.) held unanimously that ss. 7A and 18 were wholly ultra vires, consequently no answer to the second question was needed. As to the third question the Court was divided in opinion. The majority (the Chief Justice, Newcombe, Rinfret and Lamont JJ.) held that the Minister was bound to grant the licences referred to in the Regulations to any person within the classes of persons prescribed therein upon his tendering the fee provided. The minority (Duff, Mignault and Smith JJ.) were of opinion that the Minister had a discretion to grant or refuse the licence to an applicant.

The proceedings are reported at [1928] S.C.R. 457.

1929. July 9, 11, 12, 15. *Macmillan K.C.* (with him *Lafleur K.C.*, *Plaxton K.C.* and *Theobald Mathew*) for the appellant. The Parliament of Canada had authority to enact ss. 7A and 18 of the Fisheries Act, 1914, under the British North America Act, 1867, s. 91, head 12, "sea coast and inland fisheries"; in aid of the authority so given the appellant relies upon s. 91, head 2, "the regulation of trade and commerce." The operation of canneries and curing establishments is inseparably connected with the conduct of the fisheries, and is within head 12. Even if the provisions are not directly within that head so as to be valid as substantive legislation, although conflicting with s. 92, they are reasonably necessary as ancillary provisions,

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so as to make effective legislation which was strictly within s. 91, head 12. By decisions of the Board ancillary provisions of that character in a Dominion statute are valid, even though they conflict with the enumerated heads under s. 92. The Supreme Court took too narrow a view of the scope of s. 91, head 12, which was intended to give to the Dominion Parliament exclusive control over fisheries regarded as a Canadian national asset. Fisheries Acts passed in 1788 and 1859 had dealt with the curing and marketing of fish; the word "fisheries," as used in the Act of 1867, was intended to include matters of that kind. Similar matters are within the operation of fishery boards in England and Scotland, and were dealt with by the report of the Commissions on Fisheries, 1905-7. [Reference was made to *Russell v. The Queen* (1); *Hodge v. The Queen* (2); *Citizens Insurance Co. of Canada v. Parsons* (3); *Tennant v. Union Bank of Canada* (4); *Attorney-General of Ontario v. Attorney-General for Canada* (5); *Attorney-General for Ontario v. Attorney-General for Dominion* (6); *Attorney-General for Canada v. Attorneys-General for the Provinces of Ontario, etc.* (7); *Grand Trunk Ry. Co. of Canada v. Attorney-General of Canada* (8); *Toronto Corporation v. Canadian Pacific Ry. Co.* (9); *Attorney-General for British Columbia v. Attorney-General for Canada* (10); *Paquet v. Pilots' Corporation* (11); *Royal Bank of Canada v. Larue* (12); *Reg. v. Robertson* (13); Lefroy's Canadian Federal System, 2nd ed., p. 169; and *McCulloch v. State of Maryland*. (14)] As to question 2: the word "canning" in ss. 7A and 18 is not defined, and should be construed as including a floating cannery. As to question 3: the authority of the Minister under the sections and regulations is in form discretionary. There is nothing in their terms, or in the scope and objects of the legislation, from which there is to be implied, upon the principles laid down in *Julius v. Bishop of Oxford* (15), a legal duty upon the Minister.

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- (1) (1882) 7 App. Cas. 829.
- (2) (1883) 9 App. Cas. 117, 130.
- (3) (1881) 7 App. Cas. 96.
- (4) [1894] A.C. 31.
- (5) [1894] A.C. 189, 200.
- (6) [1896] A.C. 348.
- (7) [1898] A.C. 700.

- (8) [1907] A.C. 65.
- (9) [1908] A.C. 54.
- (10) [1914] A.C. 153.
- (11) [1920] A.C. 1029.
- (12) [1928] A.C. 187.
- (13) (1882) 6 Can. S.C.R. 52.
- (14) (1819) 4 Wheaton, 316.

- (15) (1880) 5 App. Cas. 214.

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Hon. Geoffrey Lawrence K.C. (with him *Wilfrid Barton*) for the Attorney-General for British Columbia; *Geoffrion K.C.* (with him *M. Alexander*) for the Attorney-General for Quebec; *Hon. Geoffrey Lawrence K.C.* for the Attorney-General for Ontario; *E. F. Newcombe K.C.* for the fishermen of Japanese origin in British Columbia. Sects. 7A and 18 of the Fisheries Act, 1914, are ultra vires. They do not relate to fisheries but to fish canneries for commercial purposes. The right to carry on a fish cannery is a civil right in the Province in which it is carried on. Fish after being caught are property in the Province where they may be. The sections therefore related directly to "property and civil rights in the Province," matters within the exclusive legislative power of the Province by s. 92, head 13, of the British North America Act, 1867. Nor were the provisions so related to the subject "fisheries" as to be valid under s. 91, head 12. Provisions in order to be valid as ancillary must be not merely convenient and reasonable, but necessary to the proper exercise of the enumerated head: *Attorney-General of Ontario v. Attorney-General for Canada* (1); *Attorney-General for Ontario v. Attorney-General for Dominion* (2); *City of Montreal v. Montreal Street Ry.* (3); dissenting judgment of Duff J. in *British Columbia Electric Ry. Co. v. Vancouver, Victoria and Eastern Ry., &c., Co.* (4), approved by the Privy Council on appeal (5); *Great West Saddlery Co. v. The King.* (6) There was no evidence of conditions which made the provisions necessary in relation to the fisheries. The Supreme Court, which was cognizant of conditions in Canada, and included judges peculiarly versed in the authorities as to legislative competence, were unanimous in holding that the sections were ultra vires. The authority of the Dominion with regard to "the regulation of trade and commerce" does not enable the Dominion to legislate as to a particular trade in a Province: *Citizens Insurance Co. of Canada v. Parsons* (7); *Attorney-General for Canada v. Attorney-General for Alberta.* (8) The Regulations upon their true construction do not enable the Minister to refuse a licence to any person within the classes named. There is

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- (1) [1894] A.C. 189, 200.
- (2) [1896] A.C. 348, 359, 360.
- (3) [1912] A.C. 333, 343.
- (4) (1913) 48 Can. S.C.R. 98, 102.

- (5) [1914] A.C. 1067.
- (6) [1921] 2 A.C. 91, 116, 120, 121.
- (7) 7 App. Cas. 96.
- (8) [1916] 1 A.C. 588.

a public right of fishing in tidal waters: *Attorney-General for British Columbia v. Attorney-General for Canada* (1); the Regulations should not be interpreted so as to derogate from that right, nor from private rights to fish. If they had that effect they would be ultra vires, but no question as to their validity was referred.

Macmillan K.C. replied.

Oct. 15. The judgment of their Lordships was delivered by

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LORD TOMLIN. This is an appeal from a judgment dated May 28, 1928, of the Supreme Court of Canada. The appellant is the Attorney-General of the Dominion of Canada. The respondents are the Attorneys-General of the Provinces of British Columbia, Quebec and Ontario and the fishermen of Japanese origin in the Province of British Columbia.

By an order of His Excellency the Governor General in Council, dated October 19, 1928, and made pursuant to the provisions of s. 60 of the Supreme Court Act, three questions as to the constitutional validity of certain sections of the Fisheries Act, 1914, and as to the interpretation of those sections, and of certain Regulations made under that Act were referred to the Supreme Court for hearing and consideration.

The judgment complained of embodies the conclusions of the Supreme Court upon the questions referred. The questions were as follows:—

“(1.) Are ss. 7A and 18 of the Fisheries Act, 1914, or either of them and in what particular or particulars or to what extent ultra vires of the Parliament of Canada?

“(2.) If the said provisions of the Fisheries Act, 1914, or either of them be intra vires of the Parliament of Canada, has the Minister authority to issue a licence for the operation of a floating cannery constructed on a float or ship, as contra-distinguished from a stationary cannery constructed on land, and if so, is he entitled to make the licence subject to any restrictions particularly as to the place of operation of any such cannery in British Columbia?

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“(3.) Under the provisions of the Special Fishery Regulations for the Province of British Columbia (made by the

(1) [1914] A.C. 153.

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Governor in Council, under the authority of s. 45 of the Fisheries Act, 1914), respecting licences to fish—namely, sub-s. 3 of s. 14; para. (a) or (b) of sub-s. 1 of s. 15 or para. (a) of sub-s. 7 of s. 24 of the said Regulations, or under said ss. 7A or 18 of the said Act (if these sections or either of them be intra vires of the Parliament of Canada) has: (a) any British subject resident in the Province of British Columbia; or (b) any person so resident who is not a British subject, upon application and tender of the prescribed fee, the right to receive a licence to fish or to operate a fish or salmon cannery in that Province, or has the Minister a discretionary authority to grant or refuse such licence to any such person whether a British subject or not?"

The Supreme Court held that the sections mentioned in the first question were ultra vires the Parliament of the Dominion, and that in view of this conclusion the second question and so much of the third question as related to the impugned sections required no answer. As to the remainder of the third question a majority of the Court held in effect that under the Regulations there was no discretion in the Minister to grant or refuse a licence to a qualified person.

In order to answer the first question it is necessary to examine the extent of the respective legislative powers of the Parliament of the Dominion and of the Provincial Legislatures. These powers rest upon the British North America Act, 1867. Part VI. of the Act is entitled "Distribution of legislative powers," and includes ss. 91 and 92.

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p. 117. Sect. 91 is headed "powers of the parliament," and provides as follows: "91. It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated."

There then follows an enumeration of twenty-nine subjects, including: (1.) The public debt and property; (2.) the regulation of trade and commerce; (3.) the raising of money by any mode or system of taxation; (10.) navigation and shipping; (12.) sea coast and inland fisheries; and (29.) such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by the Act assigned exclusively to the Legislatures of the provinces. The section then concludes with these words: "And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces."

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Sect. 92 is headed "Exclusive Powers of Provincial Legislatures," and provides that in each Province the legislature may exclusively make laws in relation to matters coming within the classes of subjects next therein enumerated. There follows an enumeration of sixteen subjects, including (2.) direct taxation within the province, in order to the raising of a revenue for provincial purposes; (10.) local works and undertakings other than such as are of certain classes mentioned therein; (13.) property and civil rights in the Province, and (16.) generally, all matters of a merely local or private nature in the province.

Questions of conflict between the jurisdiction of the Parliament of the Dominion and provincial jurisdiction have frequently come before their Lordships' Board, and as the result of the decisions of the Board the following propositions may be stated:—

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(1.) The legislation of the Parliament of the Dominion, so long as it strictly relates to subjects of legislation expressly enumerated in s. 91, is of paramount authority, even though it trenches upon matters assigned to the provincial legislatures by s. 92: see *Tennant v. Union Bank of Canada*. (1)

(2.) The general power of legislation conferred upon the Parliament of the Dominion by s. 91 of the Act in supplement of the power to legislate upon the subjects expressly

(1) [1894] A.C. 31.

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enumerated must be strictly confined to such matters as are unquestionably of national interest and importance, and must not trench on any of the subjects enumerated in s. 92 as within the scope of provincial legislation, unless these matters have attained such dimensions as to affect the body politic of the Dominion: see *Attorney-General for Ontario v. Attorney-General for the Dominion*. (1)

(3.) It is within the competence of the Dominion Parliament to provide for matters which, though otherwise within the legislative competence of the provincial legislature, are necessarily incidental to effective legislation by the Parliament of the Dominion upon a subject of legislation expressly enumerated in s. 91: see *Attorney-General of Ontario v. Attorney-General for the Dominion* (2); and *Attorney-General for Ontario v. Attorney-General for the Dominion*. (1)

(4.) There can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be ultra vires if the field is clear, but if the field is not clear and the two legislations meet the Dominion legislation must prevail: see *Grand Trunk Ry. of Canada v. Attorney-General of Canada*. (3)

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The impugned sections of the Fisheries Act, 1914, are in the following terms:—

“7A. No one shall operate a fish cannery for commercial purposes without first obtaining an annual licence therefor from the Minister. Where no other fee is in this Act prescribed for a cannery licence, the annual fee for each such licence shall be one dollar (1917, c. 16).

“18. No one shall operate a salmon cannery or salmon curing establishment in British Columbia for commercial purposes except under a licence from the Minister (1-2 Geo. 5, c. 9, s. 2).

“(2.)—(a) The annual fee for a salmon cannery licence shall be twenty dollars, and in addition, four cents for each case of forty-eight one pound cans, or the equivalent thereto, of sock-eye salmon, and three cents for each case of forty-eight one pound cans, or the equivalent thereto,

(1) [1896] A.C. 348.

(2) [1894] A. C. 189.

(3) [1907] A.C. 65.

of any other species of salmon, including steelhead (*salmo rivularis*) packed in such cannery during the continuance in force of the licence. The said twenty dollars shall be paid before the licence is issued, and the remainder of the licence fee shall be paid as the Minister may from time to time by regulation prescribe (1924, c. 43, 14-15 Geo. 5).

(b) The annual licence fee for a salmon-curing establishment shall be:—

Fifty cents on each ton or fraction thereof of dry-salted salmon put up in the establishment during the season, when the total quantity of dry-salted salmon put up in one season does not exceed ten tons;

Seventy-five cents on each ton or fraction thereof of dry salted salmon put up in the establishment during the season, when the total quantity of dry-salted salmon put up in one season exceeds ten tons but is not more than twenty tons.

One dollar on each ton or fraction thereof of dry-salted salmon put up in the establishment during the season, when the total quantity of dry-salted salmon put up in one season exceeds twenty tons but is not more than fifty tons;

One dollar and twenty-five cents on each ton or fraction thereof of dry-salted salmon put up in the establishment during the season, when the total quantity of dry-salted salmon put up in one season exceeds fifty tons (12-13 Geo. 5, c. 24, s. 1)."

The appellant seeks to support the validity of these sections first upon the ground that their subject matter is one within the subjects of express enumeration in s. 91, and secondly upon the ground that they consist of provisions necessarily incidental to effective legislation upon an enumerated subject.

The Fisheries Act, 1914, is "An Act . . . respecting fisheries and fishing," and contains a body of legislation regulating the fishing industry, and so far as it regulates that industry admittedly within the powers of the Dominion Parliament, inasmuch as sea coast and inland fisheries is one of the subjects enumerated in s. 91.

The appellant contends in the first place that the subject "sea coast and inland fisheries" covers such matters as

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the regulation of fish cannery or curing establishments, either ashore or afloat, and that the imposition of a licensing system upon such establishments is therefore justified.

It is to be observed that by s. 2 of the Fisheries Act, 1914, "fishery" in that Act means and includes the area, locality, place or station in or on which a pound, seine, net, weir, or other fishing appliance is used, set, placed or located, and the area, tract or stretch of water in or from which fish may be taken by the said pound, seine, net, weir or other fishing appliance, and also the pound, seine, net, weir or other fishing appliance used in connection therewith.

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It may well be that this definition is not an apt one to apply to the words "sea coast and inland fisheries" in s. 91 of the British North America Act, 1867. The appellant, however, seeks for the word "fisheries" in the latter Act a definition of such amplitude that it will include the operations carried out upon the fish when caught for the purpose of converting them into some form of marketable commodity. He supports his contention by referring to fishery legislation prior to 1867 affecting territories now part of the Dominion, pointing out that in this legislation there are to be found numerous provisions relating to the curing and marketing of fish, and he urges that the British North America Act, 1867, must be construed in the light of the earlier legislation, and that the word "fisheries" must be given such a meaning as is wide enough to include at any rate the operations affected by the impugned sections.

Their Lordships are of opinion that the appellant's contention in this respect is not well founded. The fact that in earlier fishery legislation raising no question of legislative competence matters are dealt with not strictly within any ordinary definition of "fishery" affords no ground for putting an unnatural construction upon the words "sea coast and inland fisheries." In their Lordships' judgment, trade processes by which fish when caught are converted into a commodity suitable to be placed upon the market cannot upon any reasonable principle of construction be brought within the scope of the subject expressed by the words "sea coast and inland fisheries."

It was but faintly urged by the appellant that the matter was covered by any other of the enumerated subjects in

s. 91. The raising of money by any mode or system of taxation was admitted not to be applicable, and their Lordships are unable to see that any other enumerated subject under s. 91 applies.

The second point made by the appellant is that the licensing of fish canning and curing establishments is necessarily incidental to effective legislation under the subject "sea coasts and inland fisheries."

It may be, though on this point their Lordships express no opinion, that effective fishery legislation requires that the Minister should have power for the purpose of enforcing regulations against the taking of unfit fish or against the taking of fish out of season, to inspect all fish canning or fish curing establishments and require them to make appropriate statistical returns. Even if this were so the necessity for applying to such establishments any such licensing system as is embodied in the sections in question does not follow. It is not obvious that any licensing system is necessarily incidental to effective fishery legislation, and no material has been placed before the Supreme Court or their Lordships' Board establishing the necessary connection between the two subject matters. In their Lordships' view, therefore, the appellant's second contention is not well founded.

The impugned sections confer powers upon the Minister in relation to matters which in their Lordships' judgment *prima facie* fall under the subject "property and civil rights in the province," included in s. 92 of the British North America Act, 1867. As already indicated, these matters are not in their Lordships' opinion covered directly or incidentally by any of the subjects enumerated in s. 91. It is not suggested that they are of national importance and have attained such dimensions as to affect the body politic of the Dominion.

In their Lordships' judgment, therefore, the impugned sections deal with matters not within the legislative competence of the Parliament of the Dominion and cannot be supported.

Having regard to the view which their Lordships take of the first question, the second question requires no answer.

It remains to deal with the third question.

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So far as this question deals with the sections which are the subject of the first question it now requires no answer. That part of it, however, which deals with certain provisions of the Special Fishery Regulations for the Province of British Columbia must be considered. The validity of these provisions is not attacked; their construction only is in question.

The following are the terms of these provisions:—

“Sect. 14.—Herring or Pilchard.

“(3.) If the captain of a herring or pilchard drag-seine or purse-seine boat that is being used in operating a herring or pilchard drag-seine or purse-seine is not himself the licensee of the said drag-seine or purse-seine, he shall require a licence from the Minister to authorise his operation of the said drag-seine or purse-seine; and no other than a British subject shall be eligible for such licence. The fee for such licence shall be one dollar.

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“Section 15.—Leases or Licences.

“(1.) (a) Except as herein otherwise provided fishing with nets or other apparatus, and the taking of abalone or crabs, except under licence from the Minister is prohibited; and in salmon fishing no one shall act as a boat puller or be otherwise employed in a boat used in salmon drifting, or as a helper, or in any other capacity in operating a purse-seine or drag-seine that is being used in salmon fishing except under licence from the Minister.

“(b) No licence shall be granted to any person, company or firm unless such person is a British subject resident in the Province or is a returned soldier, who has served in His Majesty's Canadian Navy or Army overseas, or to such company or firm unless it is a Canadian company or firm or is authorized by the Provincial Government to do business in the province.

“Sect. 24.—Salmon.

“(7.)—(a) No one shall fish for salmon for commercial purposes by means of trolling, except under licence from the Minister. Each person in a boat that is being used in trolling for salmon shall be required to have a licence.”

The question here is one of construction. Do the regulations, rightly interpreted, give to the Minister any

discretion in granting or refusing a licence where it is applied for by a qualified person?

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The regulations in question affect both public and private rights of fishing. There is no express provision for withholding a licence where a qualified applicant submits a proper application and pays the small prescribed fee, and in their Lordships' judgment there is nothing in the language of the regulations giving rise to a necessary implication that the Minister has a discretion to grant or withhold the licence. Their Lordships agree with the answer which the majority of the Supreme Court gave to the third question.

In the result, therefore, the appeal fails, and should be dismissed, and their Lordships will humbly advise His Majesty accordingly.

In accordance with the usual practice there will be no costs of the appeal as between the appellant and the respondent Attorneys-General, but the respondent fishermen will have their costs of the appeal.

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Solicitors for appellant: *Charles Russell & Co.*

Solicitors for respondents: *Gard, Lyell & Co.; Blake & Redden; Kays & Jones.*

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AND OTHERS.....}

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AND

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RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

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The word "persons" in s. 24 of the British North America Act, 1867, includes members of either sex; accordingly women having the qualifications enacted by s. 23, can be summoned by the Governor General to the Senate of Canada.

So *held* upon an examination of the Act, earlier Canadian legislation being inconclusive as to the intention of the Imperial Parliament in the matter, and decisions in England based upon the disability at common law of women to hold public office being inapplicable to the interpretation of the Act.

The provisions of the British North America Act, 1867, enacting a constitution for Canada should not be given a narrow and technical construction, but a large and liberal interpretation, so that the Dominion to a great extent, but within certain fixed limits, may be mistress in her own house, as the Provinces to a great extent, but within certain fixed limits, are mistresses in theirs.

Judgment of the Supreme Court of Canada [1928] S.C.R. 276 reversed.

APPEAL (No. 121 of 1928) by special leave from a judgment of the Supreme Court of Canada, dated April 24, 1928, in answer to a question referred to that Court by the Governor General under s. 60 of the Supreme Court Act.

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p. 125. The question referred was "Does the word 'persons' in s. 24 of the British North America Act, 1867, include female persons?"

By s. 24: "The Governor General shall from time to time, in the Queen's name, by instrument under the Great Seal of Canada, summon qualified persons to the Senate; and, subject to the provisions of this Act, every person so summoned shall become and be a member of the Senate and a senator."

**Present*:—LORD SANKEY L.C., LORD DARLING, LORD MERRIVALE, LORD TOMLIN, and SIR LANCELOT SANDERSON.

By s. 23: "The qualifications of a senator shall be as follows:—(1.) He shall be of the full age of thirty years: (2.) He shall be either a natural-born subject of the Queen, or a subject of the Queen naturalized by an Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the legislature of one of the provinces of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick, before the union, or of the Parliament of Canada after the union: (3.) He shall be legally or equitably seised as of freehold for his own use and benefit of lands or tenements held in free and common socage, or seised or possessed for his own use and benefit of lands or tenements held in francalieu or in rotture, within the province for which he is appointed, of the value of four thousand dollars, over and above all rents, dues, debts, charges, mortgages, and incumbrances due or payable out of or charged on or affecting the same: (4.) His real and personal property shall be together worth four thousand dollars over and above his debts and liabilities: (5.) He shall be resident in the province for which he is appointed: (6.) In the case of Quebec he shall have his real property qualification in the electoral division for which he is appointed, or shall be resident in that division."

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The effect of other sections of the Act material to the question, more particularly ss. 41, 84, 133, is stated in the judgment printed below.

The Supreme Court of Canada unanimously answered the question referred in the negative. Anglin C.J., whose judgment was concurred in by Lamont and Smith JJ., and substantially by Mignault J., came to the above conclusion because of the common law disability of women to hold public office. Duff J., while of opinion that that consideration should not be applied, came to the same conclusion upon an examination of the provisions of the Act. The proceedings are reported at [1928] S.C.R. 276.

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1929. July 22, 23, 25, 26. *Rowell K.C.*, with him *Lyndburn (A.-G. for Alberta)* and *Frank Gavan* for the appellants.

Laflleur K.C., *Hon. Geoffrey Lawrence K.C.*, with them *Theobald Mathew*, for the respondents.

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The arguments relied upon, both for the appellants and for the respondents, and the cases cited, appear from the judgment of the Judicial Committee.

Oct. 18. The judgment of their Lordships was delivered by

LORD SANKEY L.C. By s. 24 of the British North America Act, 1867, it is provided that "The Governor General shall from time to time, in the Queen's name, by instrument under the Great Seal of Canada, summon qualified persons to the Senate; and, subject to the provisions of this Act, every person so summoned shall become and be a member of the Senate and a senator."

The question at issue in this appeal is whether the words "qualified persons" in that section include a woman, and consequently whether women are eligible to be summoned to and become members of the Senate of Canada.

Of the appellants, Henrietta Muir Edwards is the Vice-President for the Province of Alberta of the National Council of Women for Canada; Nellie L. McClung and Louise C. McKinney were for several years members of the Legislative Assembly of the said Province; Emily F. Murphy is a police magistrate in and for the said Province; and Irene Parlby is a member of the Legislative Assembly of the said Province and a member of the Executive Council thereof.

On August 29, 1927, the appellants petitioned the Governor General in Council to refer to the Supreme Court certain questions touching the powers of the Governor General to summon female persons to the Senate, and upon October 19, 1927, the Governor General in Council referred to the Supreme Court the aforesaid question. The case was heard before Anglin C.J., Duff, Mignault, Lamont, and Smith JJ., and upon April 24, 1928, the Court answered the question in the negative; the question being understood to be "Are women eligible for appointment to the Senate of Canada."

The Chief Justice, whose judgment was concurred in by Lamont and Smith JJ., and substantially by Mignault J., came to this conclusion upon broad lines mainly because of the common law disability of women to hold public office and from a consideration of various cases which had been decided under different statutes as to their right to vote for a member of Parliament.

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Duff J., on the other hand, did not agree with this view. He came to the conclusion that women are not eligible for appointment to the Senate upon the narrower ground that upon a close examination of the British North America Act, 1867, the word "persons" in s. 24 is restricted to members of the male sex. The result therefore of the decision was that the Supreme Court was unanimously of opinion that the word "persons" did not include female persons, and that women are not eligible to be summoned to the Senate.

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Their Lordships are of opinion that the word "persons" in s. 24 does include women, and that women are eligible to be summoned to and become members of the Senate of Canada.

In coming to a determination as to the meaning of a particular word in a particular Act of Parliament it is permissible to consider two points—namely: (i.) The external evidence derived from extraneous circumstances such as previous legislation and decided cases. (ii.) The internal evidence derived from the Act itself. As the learned counsel on both sides have made great researches and invited their Lordships to consider the legal position of women from the earliest times, in justice to their argument they propose to do so and accordingly turn to the first of the above points—namely: (i.) The external evidence derived from extraneous circumstances.

The exclusion of women from all public offices is a relic of days more barbarous than ours, but it must be remembered that the necessity of the times often forced on man customs which in later years were not necessary. Such exclusion is probably due to the fact that the deliberative assemblies of the early tribes were attended by men under arms, and women did not bear arms. "*Nihil autem neque publicæ neque privatæ rei, nisi armati, agunt*": Tac. Germ., c. 13. Yet the tribes did not despise the advice of women. "*Inesse quin etiam sanctum et providum putant, nec aut consilia earum aspernantura ut responsa neglegunt*": Germ., c. 8. The likelihood of attack rendered such a proceeding unavoidable, and after all what is necessary at any period is a question for the times upon which opinion grounded on experience may move one way or another in different circumstances. This exclusion of women found its way into the opinions of the Roman jurists, Ulpian (A.D. 211)

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laying it down. "Feminæ ab omnibus officiis civilibus vel publicis remotæ sunt": Dig. 1.16.195. The barbarian tribes who settled in the Roman Empire, and were exposed to constant dangers, naturally preserved and continued the tradition.

In England no woman under the degree of a Queen or a Regent, married or unmarried, could take part in the government of the State. A woman was under a legal incapacity to be elected to serve in Parliament and even if a peeress in her own right she was not, nor is, entitled as an incident of peerage to receive a writ of summons to the House of Lords.

Various authorities are cited in the recent case of *Viscountess Rhondda's Claim* (1), where it was held that a woman was not entitled to sit in the House of Lords. Women were, moreover, subject to a legal incapacity to vote at the election of members of Parliament: Coke, 4 Inst., p. 5; *Chorlton v. Lings* (2); or of town councillor: *Reg. v. Harrald* (3); or to be elected members of a County Council: *Beresford-Hope v. Sandhurst*. (4) They were excluded by the common law from taking part in the administration of justice either as judges or as jurors, with the single exception of inquiries by a jury of matrons upon a suggestion of pregnancy: Coke, 2 Inst. 119, 3 Bl. Comm. 362. Other instances are referred to in the learned judgment of Willes J. in *Chorlton v. Lings*. (2)

No doubt in the course of centuries there may be found cases of exceptional women and exceptional instances, but as Lord Esher M.R. said in *De Souza v. Cobden* (5): "By the common law of England women are not in general deemed capable of exercising public functions, though there are certain exceptional cases where a well recognised custom to the contrary has become established." An instance may be referred to in the case of women being entitled to act as churchwardens and as sextons, the latter being put upon the ground that a sexton's duty was in the nature of

(1) [1922] 2 A.C. 339.

(2) (1868) L.R. 4 C.P. 374.

(3) (1872) L.R. 7 Q.B. 361.

(4) (1889) 23 Q.B.D. 79.

(5) [1891] 1 Q.B. 687, 691.

a private trust: *Olive v. Ingram*. (1) Also of being appointed as overseer of the poor: *Rex v. Stubbs*. (2) The tradition existed till quite modern times: see *Bebb v. Law Society* (3), where it was held by the Court of Appeal that by inveterate usage women were under a disability by reason of their sex to become attorneys or solicitors.

The passing of Lord Brougham's Act in 1850 does not appear to have greatly affected the current of authority. Sect. 4 provided that in all acts words importing the masculine gender shall be deemed and taken to include female unless the contrary as to gender is expressly provided.

The application and purview of that Act came up for consideration in *Chorlton v. Lings* (4), where the Court of Common Pleas was required to construe a statute passed in 1861, which conferred the parliamentary franchise on every man possessing certain qualifications and registered as a voter. The chief question discussed was whether by virtue of Lord Brougham's Act the words "every man" included women. Bovill C.J., having regard to the subject-matter of the statute and its general scope and language and to the important and striking nature of the departure from the common law involved in extending the franchise to women, declined to accept the view that Parliament had made that change by using the term "man" and held that the word was intentionally used expressly to designate the male sex. Willes J. said: "It is not easy to conceive that the framer of that Act, when he used the word 'expressly,' meant to suggest that what is necessarily or properly implied by language is not expressed by such language."

Great reliance was placed by the respondents to this appeal upon that decision, but in our view it is clearly distinguishable. The case was decided on the language of the Representation of the People Act, 1867, which provided that "every man" with certain qualifications and "not subject to any legal incapacity" should be entitled to be registered as a voter. Legal incapacity was not defined by the Act, and consequently reference was necessary to the common law disabilities of women.

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(1) (1738) 7 Mod. 263.
(2) (1788) 2 T.R. 395.

(3) (1914) 1 Ch. 286.
(4) (1868) L.R. 4 C.P. 374.

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A similar result was reached in the case of *Nairn v. University of St. Andrews* (1), where it was held under s. 27 of the Representation of the People (Scotland) Act, 1868, which provided that every person whose name is for the time being on the register of the general council of such university shall, being of full age and not subject to any legal incapacity, be entitled to vote in the election of a member to serve in any future Parliament for such university, that the word "person" did not include women, but the Lord Chancellor, Lord Loreburn, referred to the position of women at common law, and pointed out that they were subject to a legal incapacity. Both in this case and in the case of the Viscountess Rhondda the various judgments emphasize the fact that the legislature in dealing with the matter cannot be taken to have departed from the usage of centuries, or to have employed loose and ambiguous words to carry out a so momentous and fundamental change.

The judgment of the Chief Justice in the Supreme Court of Canada refers to and relies upon these cases, but their Lordships think that there is great force in the view taken by Duff J. with regard to them, when he says that s. 24 of the British North America Act, 1867, must not be treated as an independent enactment. The Senate, he proceeds, is part of a parliamentary system, and in order to test the contention based upon this principle that women are excluded from participating in working the Senate or any other institution set up by the Act one is bound to consider the Act as a whole and its bearings on this subject of the exclusion of women from public office and place.

Their Lordships now turn for a moment to the special history of the development of Canadian legislature as bearing upon the matter under discussion.

The Province of Canada was formed by the union under the Act of Union, 1840, of the two Provinces of Upper and Lower Canada respectively, into which the Province of Quebec as originally created by the royal proclamation of October 7, 1763, and enlarged by the Quebec Act, 1774, had been divided under the Constitutional Act of 1791. In the Province of Quebec from its first establishment in 1763 until 1774, the Government was carried on by the Governor

and the Council, composed of four named persons and eight other "persons" to be chosen by the Governor from amongst "the most considerable of the inhabitants or of other persons of property in Our said Province."

The Quebec Act of 1774 entrusted the government of the Province to a Governor and Legislative Council of such "persons" resident there, not exceeding twenty-three, nor less than seventeen, as His Majesty shall be pleased to appoint.

The Constitutional Act of 1791 upon the division of the Province of Quebec into two separate Provinces to be called the Provinces of Upper and Lower Canada established for each Province a legislature composed of the three estates of Governor, Legislative Council and Assembly empowered to make laws for the peace, order and good government of the Provinces. The Legislative Council was to consist of a sufficient number of discreet and proper "persons" not less than seven for Upper Canada and fifteen for Lower Canada.

Under the Act of Union, 1840, these two Provinces were reunited so as to constitute one Province under the name of the Province of Canada, and the Legislative Council was to be composed of such "persons" being not fewer than twenty as Her Majesty shall think fit.

In 1865 the Canadian legislature under the authority of the Imperial Act passed an Act which altered the constitution of the Legislative Council by rendering the same elective.

The new constitution as thus altered continued till the Union of 1867.

It will be noted that in all the Acts the word "persons" is used in respect of those to be elected members of the Legislative Council, and there are no adjectival phrases so qualifying the word as to make it necessarily refer to males only.

In Quebec, just as in England, there can be found cases of exceptional women and exceptional instances. For example, in certain districts—namely, at Trois Rivières in 1820—women apparently voted, while in 1828 the returning officer in the constituency of the Upper Town of Quebec refused to receive the votes of women.

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In 1834 the Canadian Parliament passed an Act of Parliament excluding women from the vote, but two years later the Act was disallowed, because the Imperial Government objected to another section in it.

The matter, however, was not left there, and in 1849 by a statute of the Province of Canada (12 Vict. c. 27), s. 46, it was declared and enacted that no woman is or shall be entitled to vote at any election, whether for any county or riding, city or town, of members to represent the people of this Province in the Legislative Assembly thereof.

The development of the maritime Provinces proceeded on rather different lines. From 1719 to 1758 the Provincial Government of Nova Scotia consisted of a Governor and a Council, which was both a legislative and an executive body composed of such fitting and discreet "persons," not exceeding twelve in number, as the Governor should nominate. A general assembly for the Province was called in 1757, and thereafter the legislature consisted of a Governor and Council and General Assembly. In 1838 the executive authority was separated from the Legislative Council, which became a distinct legislative branch only.

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In 1784 a part of the territory of the Province of Nova Scotia was erected into a separate Province to be called New Brunswick, and a separate government was established for the Province, consisting of a Governor and Council composed of certain named persons and other persons "to be chosen by you from amongst the most considerable of the inhabitants of or persons of property," but required to be men of good life and of ability suitable to their employment. In 1832 the executive authority was separated and made distinct from the Legislative Council. In the Province of Nova Scotia there was in the early Acts governing the election of members of the General Assembly no express disqualification of women from voting, but by the revised statutes of Nova Scotia (second series) in 1859 the exercise of the franchise was confined to male subjects over twenty-one years of age, and a candidate for election was required to have the qualification which would enable him to vote.

In the Province of New Brunswick by the Provincial Act (11 Vict. c. 65), s. 17, the Parliamentary franchise was confined to male persons of the full age of twenty-one years who possessed certain property qualifications.

It must, however, be pointed out that a careful examination has been made by the assistant keeper of public records of Canada of the list containing the names of the Executive and Legislative Councils and Houses of Assembly in Quebec (including those of Upper and Lower Canada), of the Province of Canada, of the Province of Nova Scotia and of the Province of New Brunswick down to 1867, and on none of the lists did he find the name of a person of the female sex.

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Such briefly is the history and such are the decisions in reference to the matter under discussion.

No doubt in any code where women were expressly excluded from public office the problem would present no difficulty, but where instead of such exclusion those entitled to be summoned to or placed in public office are described under the word "person" different considerations arise.

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The word is ambiguous, and in its original meaning would undoubtedly embrace members of either sex. On the other hand, supposing in an Act of Parliament several centuries ago it had been enacted that any person should be entitled to be elected to a particular office it would have been understood that the word only referred to males, but the cause of this was not because the word "person" could not include females but because at common law a woman was incapable of serving a public office. The fact that no woman had served or has claimed to serve such an office is not of great weight when it is remembered that custom would have prevented the claim being made or the point being contested.

Customs are apt to develop into traditions which are stronger than law and remain unchallenged long after the reason for them has disappeared.

The appeal to history therefore in this particular matter is not conclusive.

As far back as *Stradling v. Morgan* (1) it was laid down that extraneous circumstances may be admitted as an aid to the interpretation of a statute, and in *Herron v. Rathmines and Rathgar Improvement Commissioners* (2) Lord

(1) (1559) 1 Plow. 199.

(2) [1892] A.C. 498, 502.

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Halsbury L.C. said: "The subject matter with which the legislature was dealing, and the facts existing at the time with respect to which the legislature was legislating, are legitimate topics to consider in ascertaining what was the object and purpose of the legislature in passing the Act," but the argument must not be pushed too far, and their Lordships are disposed to agree with Farwell L.J. in *Rex v. West Riding of Yorkshire County Council* (1), "although it may, perhaps, be legitimate to call history in aid to show what facts existed to bring about a statute, the inferences to be drawn therefrom are extremely slight": see Craies, *Statute Law*, 3rd ed., p. 118.

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Over and above that, their Lordships do not think it right to apply rigidly to Canada of to-day the decisions and the reasons therefor which commended themselves, probably rightly, to those who had to apply the law in different circumstances, in different centuries, to countries in different stages of development. Referring therefore to the judgment of the Chief Justice and those who agreed with him, their Lordships think that the appeal to Roman law and to early English decisions is not of itself a secure foundation on which to build the interpretation of the British North America Act of 1867.

Their Lordships fully appreciate the learned arguments set out in his judgment, but prefer, on this part of the case, to adopt the reasonings of Duff J., who did not agree with the other members of the Court, for reasons which appear to their Lordships to be strong and cogent. As he says: "Nor am I convinced that the reasoning based upon the 'extraneous circumstances' we are asked to consider (the disabilities of women under the common law and the law and practice of Parliament in respect of appointment to public place or office) establishes a rule of interpretation for the British North America Act, by which the construction of powers, legislative and executive, bestowed in general terms is controlled by a presumptive exclusion of women from participating in the working of the institutions set up by the Act."

Their Lordships now turn to the second point—namely, (ii.) the internal evidence derived from the Act itself.

(1) [1906] 2 K.B. 676, 716.

Before discussing the various sections they think it necessary to refer to the circumstances which led up to the passing of the Act.

The communities included within the Britannic system embrace countries and peoples in every stage of social, political and economic development and undergoing a continuous process of evolution. His Majesty the King in Council is the final Court of Appeal from all these communities, and this Board must take great care therefore not to interpret legislation meant to apply to one community by a rigid adherence to the customs and traditions of another. Canada had its difficulties both at home and with the mother country, but soon discovered that union was strength. Delegates from the three maritime Provinces met in Charlottetown on September 1, 1864, to discuss proposals for a maritime union. A delegation from the coalition government of that day proceeded to Charlottetown and placed before the maritime delegates their schemes for a union embracing the Canadian Provinces. As a result the Quebec conference assembled on October 10, continued in session till October 28, and framed a number of resolutions. These resolutions as revised by the delegates from the different Provinces in London in 1866 were based upon a consideration of the rights of others and expressed in a compromise which will remain a lasting monument to the political genius of Canadian statesmen. Upon those resolutions the British North America Act of 1867 was framed and passed by the Imperial legislature. The Quebec resolutions dealing with the Legislative Council—namely, Nos. 6-24—even if their Lordships are entitled to look at them, do not shed any light on the subject under discussion. They refer generally to the “members” of the Legislative Council.

The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada. “Like all written constitutions it has been subject to development through usage and convention”: Canadian Constitutional Studies, Sir Robert Borden (1922), p. 55.

Their Lordships do not conceive it to be the duty of this Board—it is certainly not their desire—to cut down the provisions of the Act by a narrow and technical con-

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struction, but rather to give it a large and liberal interpretation so that the Dominion to a great extent, but within certain fixed limits, may be mistress in her own house, as the Provinces to a great extent, but within certain fixed limits, are mistresses in theirs. "The Privy Council, indeed, has laid down that Courts of law must treat the provisions of the British North America Act by the same methods of construction and exposition which they apply to other statutes. But there are statutes and statutes; and the strict construction deemed proper in the case, for example, of a penal or taxing statute or one passed to regulate the affairs of an English parish, would be often subversive of Parliament's real intent if applied to an Act passed to ensure the peace, order and good government of a British Colony": see Clement's *Canadian Constitution*, 3rd ed., p. 347.

The learned author of that treatise quotes from the argument of Mr. Mowat and Mr. Edward Blake before the Privy Council in *St. Catherine's Milling and Lumber Co. v. The Queen* (1): "That Act should be on all occasions interpreted in a large, liberal and comprehensive spirit, considering the magnitude of the subjects with which it purports to deal in very few words." With that their Lordships agree, but as was said by the Lord Chancellor in *Brophy v. Attorney-General of Manitoba* (2), the question is not what may be supposed to have been intended, but what has been said.

It must be remembered, too, that their Lordships are not here considering the question of the legislative competence either of the Dominion or its Provinces which arise under ss. 91 and 92 of the Act providing for the distribution of legislative powers and assigning to the Dominion and its Provinces their respective spheres of Government. Their Lordships are concerned with the interpretation of an Imperial Act, but an Imperial Act which creates a constitution for a new country. Nor are their Lordships deciding any question as to the rights of women but only a question as to their eligibility for a particular position. No one, either male or female, has a right to be summoned to the Senate. The real point at issue is whether the Governor General has a right to summon women to the Senate.

The Act consists of a number of separate heads.

(1) (1888) 14 App. Cas. 43, 50.

(2) [1895] A.C. 202, 216.

The preamble states that the Provinces of Canada, Nova Scotia and New Brunswick have expressed their desire to be federally united into one Dominion under the Crown of the United Kingdom of Great Britain and Ireland with a constitution similar in principle to that of the united Kingdom.

Head No. 2 refers to the union.

Head No. 3, ss. 9 to 16, to the executive power.

It is in s. 11 that the word "persons," which is used repeatedly in the Act, occurs for the first time.

It provides that the persons who are members of the Privy Council shall be from time to time chosen and summoned by the Governor General.

The word "person," as above mentioned, may include members of both sexes, and to those who ask why the word should include females the obvious answer is why should it not? In these circumstances the burden is upon those who deny that the word includes women to make out their case.

Head No. 4 (ss. 17-20) deals first with the legislative power. Sect. 17 provides there shall be one Parliament for Canada consisting of the Queen, an upper house styled the Senate, and the House of Commons. Sects. 21-36 deal with the creation, constitution and powers of the Senate. They are the all important sections to consider in the present case, and their Lordships return to them after briefly setting out the remaining sections of the Act.

Sects. 37-57 deal with the creation, constitution and powers of the House of Commons with special reference to Ontario, Quebec, Nova Scotia and New Brunswick, which were the first Provinces to come in under the scheme, although power was given under s. 146 for other Provinces to come in, which other Provinces have availed themselves of.

Head No. 5 (ss. 58-90) deals with the Provincial constitutions, and defines both their executive and legislative powers; head No. 6 (ss. 91-95) deals with the distribution of legislative powers; head No. 7 (ss. 96-101) deals with the judicature; head No. 8 (ss. 102-126) deals with revenues, debts, assets and taxation; head No. 9 (ss. 127-144)

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deals with miscellaneous provisions; head No. 10 (s. 145) deals with the intercolonial railway; and head No. 11 (ss. 146, 147) deals with the admission of other colonies.

Such being the general analysis of the Act, their Lordships turn to the special sections dealing with the Senate.

It will be observed that s. 21 provides that the Senate shall consist of seventy-two members, who shall be styled senators. The word "member" is not in ordinary English confined to male persons. Sect. 24 provides that the Governor General shall summon qualified persons to the Senate.

As already pointed out, "persons" is not confined to members of the male sex, but what effect does the adjective "qualified" before the word "persons" have?

In their Lordships' view it refers back to the previous section, which contains the qualifications of a senator. Sub-ss. 2 and 3 appear to have given difficulties to the Supreme Court. Sub-s. 2 provides that the qualification of a senator shall be that he shall be either a natural born subject of the Queen, naturalized by an Act of Parliament of Great Britain or of one of the Provincial Legislatures before the union or of the Parliament of Canada after the union. The Chief Justice in dealing with this says that it does not include those who become subjects by marriage, a provision which one would have looked for had it been intended to include women as being eligible.

The attention of the Chief Justice, however, was not called to the Aliens Act, 1844 (7 & 8 Vict. c. 66), s. 16 of which provides that any woman married or who shall be married to a natural born subject or person naturalized shall be deemed and taken to be herself naturalized, and have all the rights and privileges of a natural born subject. The Chief Justice assumed that by common law a wife took her husband's nationality on marriage, but by virtue of that section any woman who marries a natural born or naturalized British subject was deemed and taken to be herself naturalized. Accordingly, s. 23, sub-s. 2, uses language apt to cover the case of those who become British subjects by marriage.

Their Lordships agree with Duff J. when he says: "I attach no importance to the use of the masculine personal pronoun in s. 23, and, indeed, very little importance to the

provision in s. 23 with regard to nationality," and refer to s. 1 of the Interpretation Act, 1889, which in s. 1, sub-s. 2, provides that words importing the masculine gender shall include females.

The reasoning of the Chief Justice would compel their Lordships to hold that the word "persons" as used in s. 11 relating to the constitution of the Privy Council for Canada was limited to "male persons," with the resultant anomaly that a woman might be elected a member of the House of Commons but could not even then be summoned by the Governor General as a member of the Privy Council.

Sub-s. 3 of s. 23 provided that the qualification of a senator shall be that he is legally and equitably seised of a freehold for his own use and benefit of lands and tenements of a certain value. This section gave some trouble to Duff J., who says that sub-section points to the exclusion of married women, and would have been expressed in a different way if the presence of married women had been contemplated. Their Lordships think that this difficulty is removed by a consideration of the rights of a woman under the Married Women's Property Acts. A married woman can possess the property qualification required by this sub-section. Apart from statute a married woman could be equitably seized of freehold property for her own use only, and by an Act respecting certain separate rights of property of married women, consolidated statutes of Upper Canada, cap. 73, s. 1, it was provided: "Every woman who has married since May 4, 1859, or who marries after this Act takes effect, without any marriage contract or settlement, shall and may, notwithstanding her coverture, have, hold and enjoy all her real and personal property . . . in as full and ample a manner as if she continued sole and unmarried. . . ."

Their Lordships do not think it possible to interpret the word "persons" by speculating whether the framer of the British North America Act purposely followed the system of Legislative Councils enacted in the Acts of 1791 and 1840 rather than that which prevailed in the maritime Province for the model on which the Senate was to be formed, neither do they think that either of these sub-sections is sufficient to rebut the presumption that the word "persons" includes women. Looking at the sections which deal with the Senate as a whole (ss. 21-36) their

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Lordships are unable to say that there is anything in those sections themselves upon which the Court could come to a definite conclusion that women are to be excluded from the Senate.

So far with regard to the sections dealing especially with the Senate—are there any other sections in the Act which shed light upon the meaning of the word “persons”?

Their Lordships think that there are. For example, s. 41 refers to the qualifications and disqualifications of persons to be elected or to sit or vote as members of the House of Assembly or Legislative Assembly, and by a proviso it is said that until the Parliament of Canada otherwise provides at any election for a member of the House of Commons for the district of Algoma in addition to persons qualified by the law of the Province of Canada to vote every male British subject aged twenty-one or upwards being a householder shall have a vote. This section shows a distinction between “persons” and “males.” If persons excluded females it would only have been necessary to say every person who is a British subject aged twenty-one years or upwards shall have a vote.

Again in s. 84, referring to Ontario and Quebec, a similar proviso is found stating that every male British subject in contradistinction to “person” shall have a vote.

Again in s. 133 it is provided that either the English or the French language may be used by any person or in any pleadings in or issuing from any court of Canada established under this Act and in or from all of any of the courts of Quebec. The word “person” there must include females, as it can hardly have been supposed that a man might use either the English or the French language but a woman might not.

If Parliament had intended to limit the word “persons” in s. 24 to male persons it would surely have manifested such intention by an express limitation, as it has done in ss. 41 and 84. The fact that certain qualifications are set out in s. 23 is not an argument in favour of further limiting the class, but is an argument to the contrary, because it must be presumed that Parliament has set out in s. 23 all the qualifications deemed necessary for a senator, and it does not state that one of the qualifications is that he must be a member of the male sex.

Finally, with regard to s. 33, which provides that if any question arises respecting the qualifications of a senator or a vacancy in the Senate the same shall be heard and determined by the Senate that section must be supplemented by s. 1 of the Parliament of Canada Act, 1875, and by s. 4 of c. 10 of R.S. Can., and their Lordships agree with Duff J. when he says, "as yet, no concrete case has arisen to which the jurisdiction of the Senate could attach. We are asked for advice on the general question, and that, I think, we are bound to give. It has, of course, only the force of an advisory opinion. The existence of this jurisdiction of the Senate does not, I think, affect the question of substance. We must assume that the Senate would decide in accordance with the law."

The history of these sections and their interpretation in Canada is not without interest and significance.

From confederation to date both the Dominion Parliament and the Provincial legislatures have interpreted the word "persons" in ss. 41 and 84 of the British North America Act as including female persons, and have legislated either for the inclusion or exclusion of women from the class of persons entitled to vote and to sit in the Parliament and Legislature respectively, and this interpretation has never been questioned.

From confederation up to 1916 women were excluded from the class of persons entitled to vote in both Federal and Provincial elections. From 1916 to 1922 various Dominion and Provincial Acts were passed to admit women to the franchise and to the right to sit as members in both Dominion and Provincial legislative bodies. At the present time women are entitled to vote and to be candidates: (1.) At all Dominion elections on the same basis as men. (2.) At all Provincial elections save in the Province of Quebec.

From the date of the enactment of the Interpretation Acts in the Province of Canada, Nova Scotia and New Brunswick prior to confederation and in the Dominion of Canada since confederation and until the franchise was extended, women have been excluded by express enactment from the right to vote.

Neither is it without interest to record that when upon May 20, 1867, the Representation of the People Bill came before a Committee of the House of Commons, John Stuart

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Mill moved an amendment to secure women's suffrage, and the amendment proposed was to leave out the word "man" in order to insert the word "person" instead thereof: see Hansard, 3rd series, vol. clxxxvii., col. 817.

A heavy burden lies on an appellant who seeks to set aside a unanimous judgment of the Supreme Court, and this Board will only set aside such a decision after convincing argument and anxious consideration, but having regard: (1.) To the object of the Act—namely, to provide a constitution for Canada, a responsible and developing State; (2.) that the word "person" is ambiguous, and may include members of either sex; (3.) that there are sections in the Act above referred to which show that in some cases the word "person" must include females; (4.) that in some sections the words "male persons" are expressly used when it is desired to confine the matter in issue to males; and (5.) to the provisions of the Interpretation Act; their Lordships have come to the conclusion that the word "persons" in s. 24 includes members both of the male and female sex, and that, therefore, the question propounded by the Governor General should be answered in the affirmative, and that women are eligible to be summoned to and become members of the Senate of Canada, and they will humbly advise His Majesty accordingly.

Solicitors for appellants and for Attorney-General for Quebec: *Blake & Redden.*

Solicitors for Attorney-General for Canada: *Charles Russell & Co.*

[PRIVY COUNCIL.]

ERIE BEACH COMPANY,
LIMITED..... }

APPELLANTS; J.C.*
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ON APPEAL FROM THE SUPREME COURT OF ONTARIO,
APPELLATE DIVISION.

Canada (Ontario)—Succession duty—Shares in Ontario company—Business conducted in United States—Situation of shares—Liability of company for duty—Legislative authority of Province—Succession Duty Act (R.S. Ont., 1914, c. 24), ss. 7, 10, sub-s. 2—British North America Act, 1867 (30 & 31 Vict. c. 3), s. 92, head 2.

The Succession Duty Act of Ontario provides by s. 7 that property situate in Ontario shall be subject to a succession duty; and by s. 10, sub-s. 2, that any corporation or person allowing a transfer of property which is subject to the duty before the duty has been paid or secured shall be liable to pay the duty.

The appellant company was incorporated under the Ontario Companies Act, and had its chief office in that Province. All its meetings, whether of shareholders or directors, were held at Buffalo, U.S.A.; the company's business was conducted from its office there; its books and records were kept, shares issued, and transfers made and recorded, at the office in Buffalo:—

Held (1.) that, as by the Ontario Companies Act the shares of the company could be effectually dealt with only in Ontario, shares of which a deceased person resident in the United States was the registered holder, and shares which he was entitled to have allotted under a contract with the company, were property situate in Ontario, and liable to duty under s. 7 of the Succession Duty Act; (2.) that s. 10, sub-s. 2, of the Act was not indirect taxation so as to be invalid under s. 92, head 2, of the British North America Act, 1867, as a company or person thereby made liable to pay the duty was not entitled to recoupment by anybody.

Brassard v. Smith [1925] A.C. 371 and *Attorney-General for British Columbia v. Canadian Pacific Ry. Co.* [1927] A.C. 934 applied.

Judgment of the Supreme Court of Ontario affirmed.

APPEAL (No. 41 of 1929) from a judgment of the Appellate Division of the Supreme Court of Ontario (January 14, 1929) reversing a judgment of Logie J. (December 30, 1927).

The appellant company brought an action against the respondent in the Supreme Court of Ontario, claiming

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**Present*:—LORD SANKEY L.C., LORD DARLING, LORD MERRIVALE, LORD TOMLIN and MR. JUSTICE DUFF.

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on an agreed statement of facts that certain shares in the appellant company registered in the name of F. V. E. Bardol, deceased, and certain further shares in the company to an allotment of which he was entitled by contract with the company, were not subject to duty under the Ontario Succession Duty Act (R.S. Ont., 1914, c. 24); and that the company was not liable to pay the duty if it allowed a transfer of the shares to be made before the duty was paid.

The questions arising were: (1.) whether the shares in question were "property situate in Ontario," so as to be liable to duty under s. 7 of the above Act; and, if they were, (2.) whether s. 10 of Act (as amended by 15 Geo. 5, c. 13, s. 7), which provided that the company should be liable to pay the duty if it allowed a transfer of the shares before the duty was paid or secured, was *ultra vires* under the British North America Act, 1867.

The facts and the material provisions of the Succession Duty Act appear from the judgment of the Judicial Committee.

The trial judge (Logie J.) held that the shares were not liable to duty under the Act, and made the declaration prayed.

On appeal to the Appellate Division the decision was reversed, and the suit dismissed. The learned judges (Mulock C.J. and Magee, Hodgins, and Grant JJ.) held that the shares were property situate in Ontario, and that accordingly the duty was payable out of the estate; also, that s. 10 of the Act was *intra vires*. The appeal is reported at 63 Ont. L.R. 469.

1929. July 15, 16. *Tilley K.C.* and *Kingstone K.C.* for the appellants. Liability to the duty in respect of the issued shares, and in respect of the shares not allotted at the death of the deceased, should be considered separately. The issued shares were not property "situate in Ontario" within s. 7 of the Act. Although the head office of the company was in Ontario, its by-laws gave it authority to hold meetings of its shareholders and directors outside the Province and provided that transfers of shares could be recorded otherwise than at the head office. All the meetings of shareholders and of directors were held at Buffalo, in the United States, and the book recording transfers of shares was kept there. Upon a transfer being passed by

the directors, and entered in the book, the transferee became entitled to a certificate. The certificate issued by a Canadian company is a certificate that the person named is owner of the shares, not that he is on the share register; not being on the register at the head office would not be conclusive against him. The Supreme Court, applying *Attorney-General v. Higgins* (1); *Brassard v. Smith* (2); and *In re Aschrott* (3) held that the situation of the shares was the place where they could be dealt with effectually; the Court was wrong in holding that that place was Ontario. Although the company was to be regarded as resident in Ontario it was domiciled in the United States, and the shares were in the possession of the deceased, who was there domiciled. With regard to the balance of the shares: they did not stand in the name of the deceased, nor were they held in trust for him; his rights in relation to them were contractual. The situation of that asset was the place for the performance of the contract by the allotment of the shares; that place was Buffalo. In any case there could be no liability on the company save under s. 10 of the Act, and that section was ultra vires the Provincial Legislature under the British North America Act, 1867, s. 92, head 2. Sub-s. 1 was ultra vires, because it made the situation of the head office the test, even if the shares were situate outside Ontario. Sub-s. 2 was ultra vires, because it was not direct taxation, in that it imposed liability for the duty upon persons other than those who it was intended should pay it: *Burland v. The King*. (4)

W. A. Greene K.C. and *A. W. Marquis K.C.* for the respondent. Under the authorities already referred to the issued shares were situate where they could be effectually dealt with; that was at the head office of the company in Ontario. By the Ontario Companies Act, ss. 56, 57, 60, 118 and 119, the shares were transferable only in the book containing the names of the shareholders, which book had to be kept at the head office. A person not on that register was not a shareholder. The situation of the shares to be allotted was the place where they could effectually

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(1) (1857) 2 H. & N. 339.
(2) [1925] A.C. 371.

(3) [1927] 1 Ch. 313, 320.
(4) [1922] 1 A.C. 215.

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be reduced into possession; that, for the above reasons, was also the head office in Ontario. Sect. 10 of the Succession Duty Act is *intra vires*. The provision in sub-s. 2 is not an indirect tax. It is not a tax at all, but a penalty upon the company if it voluntarily breaks the law. It is not indirect, since a company made liable under the provision has no means of recovering the duty from the shareholders' estate. Mill's definition of direct and indirect taxes is merely a working rule; the substance of the impugned provision must be looked at: *Rex v. Caledonian Collieries*. (1)

Tilley K.C. in reply referred to *Attorney-General for British Columbia v. Canadian Pacific Ry. Co.* (2)

Nov. 7. The judgment of their Lordships was delivered by

LORD MERRIVALE. The Erie Beach Company, Ltd., appeals against the judgment of the Appellate Division of the Supreme Court in an action upon an agreed statement of facts wherein the company prayed a declaration that certain shares of its capital stock registered in the name of Frank V. E. Bardol, deceased, and other like shares allotable to him under a contract of his with the company were not upon his death subject to duty under the Ontario Succession Duty Act; a declaration that the company is not under s. 10 of the Act liable to pay duty in respect of a transfer of such shares permitted by the company before payment of succession duty thereon or security given for the payment of the same; and a declaration that s. 10 of the Act in so far as it purports to impose the last mentioned duty on the company is *ultra vires* of the Province of Ontario.

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p. 165. Frank V. E. Bardol was at all material times domiciled in the State of New York in the United States of America. The plaintiff company is incorporated in Ontario under the Ontario Companies Act, 1914, having as its chief object the establishment, ownership and conduct of an amusement park upon a site at the village of Fort Erie on the Canadian shore of Lake Erie, within easy reach of the city of Buffalo. Mr. Bardol was apparently the person chiefly concerned

(1) [1928] A.C. 358.

(2) [1927] A.C. 934.

in the undertaking. In consideration of assignments of property made by him to the company 9000 preferred and 1000 ordinary shares of \$100 each therein, fully paid, were agreed to be issued to him; 100 of the ordinary shares were issued, 96 to him and 4 to nominees of his. The remainder were to be issued when and as he should direct, and remained unissued at his death in April, 1925. Probate of the will of Frank V. E. Bardol was granted in 1925 in the proper court in the State of New York. The plaintiff company in 1926 issued certificates for the testator's previously unissued shares, but was notified on behalf of the Attorney-General of Ontario that it would be held liable under the terms of the Provincial statutes if it should permit any transfer before succession duty had been paid or secured. Thereupon the company brought the present action. At first instance judgment was given in its favour, but the Appellate Division was unanimously of opinion against the several contentions raised by the plaintiffs. The Court held the shares to be subject to succession duty, the statute *intra vires* of the Provincial Legislature, and the contingent liability of the company under s. 10 to be well founded in law.

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The Ontario Succession Duty Act (R.S.O., 1914, c. 24) by s. 7 imposes succession duty on "all property situate in Ontario and any income therefrom passing on the death of any person, whether the deceased was at the time of his death domiciled in Ontario or elsewhere," and no question was raised but that this enactment, so far as s. 7 goes, is within the legislative powers of the Province as a measure of direct taxation within the terms of the British North America Act, 1867, s. 92. What was mainly in dispute upon the hearing at this Board was whether the shares in question were assets of the testator situate in Ontario. There was, however, the further question whether, in any view of the matter, s. 10 of the statute, imposing liability not upon succession to shares, but upon the corporation in which the shares exist, without the accrual of any successory interest in them to the company, is or is not indirect taxation and so beyond the legislative powers of the Province.

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The material words of s. 10, as amended in 1925, are: "No property in Ontario belonging to any deceased person at the time of his death or held in trust for him, whether

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such deceased person was at the time of his death domiciled in Ontario or elsewhere, shall be transferred until the duty, if any, is paid or security given therefor, and any corporation or person allowing such property to be so transferred contrary to this sub-section shall be liable for such duty."

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The nature of the property in the shares in question depends in the main—if not wholly—upon the terms of the enactment under which the plaintiff company subsists: the Ontario Companies Act (R.S. Ont., 1914, c. 178). This statute of the Provincial Legislature provides for the grant of incorporation by the Lieutenant-Governor in Council, for purposes whereto the authority of the Legislature extends, to be set forth in the petition for incorporation. One of the antecedent requirements for incorporation is a statement by the petitioner or petitioners of a place in Ontario where the head office of the company is to be situate. The shares are by s. 56 to be deemed to be personal estate transferable on the books of the company. Under s. 60 no transfer is valid or effectual save as exhibiting the rights of the parties thereto toward each other until entry thereof is made in the books of the company. By-law 22 of the company provides, further, that the shares shall be transferable only by the recording of the transfer on the stock-book of the company at their head office or the office of their transfer agents, if any, and the company's authorized form of certificate states that the shares are transferable only on the books of corporation by the holder in person or his attorney upon surrender of the certificate properly indorsed. By s. 118 of the statute the company's register of shares and shareholders is required to be kept at its head office "within Ontario," and (by s. 119) available for inspection. There is provision in the statute—see ss. 52 and 119—for relaxation of the stringency of some relevant provisions by special Act, or letters patent, or by-laws, or leave of the Lieutenant-Governor, but no such special sanction exists in this case. By s. 121 of the statute jurisdiction is given to the Supreme Court of Ontario to order rectification of the books, and to determine questions of title in relation to the shares.

On the face of the statutory conditions above enumerated, it must be seen that if the corporation has a local

habitation Ontario is its locality. For the appellants, however, facts are relied upon such as in the case of an individual might well have warranted an argument, that the person in question had chosen as his place of domicile the State of New York and had followed up his choice by action effectual to secure domicile there.

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Frank V. E. Bardol and his associates in the organization of the company and the conduct of its affairs appear to have been all of them people of the State of New York. Every meeting of the company, whether of shareholders or of directors, took place in the City of Buffalo; the management of the company's business was conducted from its office in Buffalo; its books, records and documents were kept there; the common shares actually issued were issued there, and such transfers as took place were made and recorded there.

The appellants contended that shares in a joint stock company have no local situation, that, like debts and other choses in action and rights arising ex contractu, they constitute property of which the value—applying the maxim “*Mobilia sequuntur personam*”—is taxable at the place of domicile of the deceased possessor. This view was adopted by Logie J. at the trial of the action.

A series of judicial decisions extending from *Attorney-General v. Higgins* (1), in the Court of Exchequer in 1857, to *Brassard v. Smith* (2), before this Board in 1924, have ascertained beyond possible doubt the test which must be applied to determine the local situation of the shares of a joint stock company when that fact has to be determined in order to decide as to liability to or immunity from local taxation. *Cotton v. The King* (3) and *Burland v. The King* (4), which were much discussed in the argument here, show the working of the rule, but do not qualify it as previously laid down.

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In *Attorney-General v. Higgins* (1), as in *Brassard v. Smith* (5), duty upon shares was in question. In *Attorney-General v. Higgins* (1) Baron Martin held that when transfer

(1) 2 H. & N. 339.
(2) [1925] A.C. 371.
(3) [1914] A.C. 176.

(4) [1922] 1 A.C. 215.
(5) [1925] A.C. 371.

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of shares in a company must be effected by a change in the register, the place where the register is required by law to be kept determines the locality of the shares. Lord Dunedin, in delivering the judgment of this Board in *Bras-sard v. Smith*, epitomized the crucial inquiry in a sentence—"Where could the shares be effectually dealt with?" The circumstances relied upon by the appellants which show the predilection of the members of the plaintiff company for transacting its business in Buffalo—so far as they might—have, in their Lordships' opinion, no material weight. The shares in question can be effectually dealt with in Ontario only. They are therefore property situate in Ontario and subject to succession duty there.

The remaining question in the case is whether the liability purported to be created by s. 10, sub-s. 2, of the statute in question is of such a nature as to render the subsection null as being made without authority; that is to say, as exceeding the power of the Provincial Legislature under the British North America Act, 1867, s. 92, to make laws in relation to direct taxation within the Province. On behalf of the appellants it was contended that the statute, in so far as it purports to create a liability in the plaintiff company, does not in truth impose succession duty on the company, but lays a tax upon persons not concerned in the succession in question in the expectation and with the intention that they shall indemnify themselves at the expense of those actually interested in the succession. "A direct tax," it was said on undoubted authority, "is one which is demanded from the very person who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and the intention that he shall indemnify himself at the expense of another." The practical distinction between direct and indirect taxation formulated by John Stuart Mill in his *Political Economy* is, as was pointed out in *Attorney-General for British Columbia v. Canadian Pacific Ry. Co.* (1), "not a legal definition," but "a fair basis for testing the character of the tax in question." The question to be answered in the present case is not much helped by considering whether the impost effected by s. 10, sub-s. 2, resembles more nearly stamp duties such as were held in

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Attorney-General for Quebec v. Reed (1), to be a form of indirect taxation, or duties on licences, which in *Bank of Toronto v. Lambe* (2) were found to be direct taxes, or indeed by examination of various other cases to which their Lordships were referred. It is in truth this—Is the intention of s. 10, sub-s. 2, that when a corporation allows property of a deceased person to be transferred without provision previously made for succession duty, the corporation shall incur a liability beginning and ending with itself and answerable so far as legal liability goes out of its corporate funds alone, or does the section intend that the corporation shall pay the succession duty on behalf of the persons concerned, and by so doing become entitled to recover from such persons the amount paid?

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The answer to the question so stated must be determined by the terms of the statute. Sect. 10, sub-s. 2, it will be seen, does two things. It enacts a prohibition in the words following: "No property in Ontario belonging to any deceased person at the time of his death or held in trust for him, whether such deceased person was at the time of his death domiciled in Ontario or elsewhere, shall be transferred, paid or given to the person entitled thereto until the duty, if any, is paid or security given therefor." Next it proceeds to provide that "Any corporation or person allowing such property to be so transferred, paid or given contrary to this sub-section shall be liable for such duty."

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The statute makes no provision for reimbursement of the company from any quarter, and no such provision can be implied. Breach of a statutory prohibition is *prima facie* a misdemeanour. It could no doubt be argued on the part of a person convicted of the misdemeanour of a wilful breach of the prohibition here under consideration that his guilt involved him only in the liability created by the second enactment in the sub-section, and if that question arises it will be determined. Meantime, it is sufficient to say, as is said in the judgment of the learned Chief Justice in the Court of Appeal, "that sub-section penalises a company which permits any property of a deceased person to be transferred to the beneficiary until the duty payable in

(1) (1884) 10 App. Cas. 141.

(2) (1887) 12 App. Cas. 575.

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respect thereof is paid, and a company so penalised is not entitled to recover the penalty from the beneficiary."

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Their Lordships will humbly advise His Majesty that the appeal should be dismissed. The costs here and below will be borne by the appellants.

Solicitors for appellants: *Lawrence Jones & Co.*

Solicitors for respondent: *Blake & Redden.*

[PRIVY COUNCIL.]

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AND

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COMPANY, LIMITED.....}

RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

*Canada (British Columbia)—Legislative power—Taxation—Export tax—
Customs and Excise—Indirect taxation—Timber—Forest Act (Rev.
Stat. of B.C., 1924, c. 93), s. 58—British North America Act, 1867
(30 & 31 Vict. c. 3), s. 92, head 2; s. 122.*

Sect. 58 of the Forest Act, 1924, of British Columbia, imposed a tax upon all timber cut within the Province, except that upon which a royalty was payable, but provided that in the case of timber used or manufactured in the Province there should be a rebate of nearly the whole tax. The Act prohibited under penalty the export of any timber without a certificate that the tax due in respect of it had been paid:—

Held, that the tax was invalid because it was an export tax, and so fell within the category of duties of customs and excise, which the Dominion legislature had exclusive power to impose by s. 122 of the British North America Act, 1867; also because it was indirect taxation, and therefore not within the legislative power of the Province under s. 92, head 2, of that Act.

A tax levied on a commercial commodity upon the occasion of its exportation in pursuance of trading transactions cannot be described as a tax whose incidence, by its nature, is such that it is finally borne by the first payer and is not susceptible of being passed on.

Judgment of the Supreme Court of British Columbia affirmed.

APPEAL (No. 115 of 1929) by special leave from a judgment of the Supreme Court of British Columbia, dated May 23, 1929.

The respondents brought an action in the Supreme Court against the appellant, claiming (inter alia) a declaration that s. 58 of the Forest Act, 1924, of British Columbia, which imposes a tax upon timber cut within the Province, and ss. 62 and 127 of that Act, so far as they implemented s. 58, were ultra vires the Provincial legislature.

The provisions of the sections in question and the material facts appear from the judgment of the Judicial Committee. 1930 A.C.
p. 358.

**Present:*—LORD BLANESBURGH, LORD MERRIVALE, LORD TOMLIN, LORD RUSSELL OF KILLOWEN, and LORD MACMILLAN.

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The action was tried by Morrison C.J., who held that the taxation, owing to its nature and the general tendency to pass it on to a purchaser, was indirect, and therefore not within the Provincial legislative power under s. 92, head 2, of the British North America Act, 1867. He accordingly made the declaration prayed.

Special leave to appeal was granted by the Judicial Committee.

1930. Feb. 6, 7, 10. *Hon. Geoffrey Lawrence K.C.* and *Wilfred Barton* for the appellant. The tax imposed by s. 58 of the Forest Act is a tax upon property—namely, cut timber—and is therefore direct taxation within s. 92, head 2, of the British North America Act, 1867. The decision of the Board in *City of Halifax v. Fairbanks' Estate* (1), that a tax upon property is a direct tax, and that a consideration of its ultimate incidence was inadmissible, is not confined to immovable property. Duties of customs and excise are by their nature indirect taxes, because bonded warehouses provide machinery for their being passed on. The Forest Act contains no machinery for that purpose. The evidence showed that the tax made no difference in the price of the timber in the State of Washington. It was a tax imposed upon the owner, with provisions enabling him to defer payment until he realized the value of the timber. *A.-G. for British Columbia v. Canadian Pacific Ry. Co.* (2), which was relied on below, is distinguishable, as there the tax was in effect upon dealings with a commodity in the Province. The terms of s. 121 of the British North America Act, 1867, show that that and the following sections deal with taxes on importation into a Province. The timber tax should be considered as part of the Provincial scheme of taxation upon land according to its produce. That appears, as timber grown upon land granted before 1887 being subject to a royalty was not taxed by s. 58. [Reference was made also to *A.-G. for Quebec v. Queen Insurance Co.* (3); *Bank of Toronto v. Lambe* (4); *Brewers' and Maltsters' Association for Ontario v. A.-G. for Ontario* (5); *Smith v. Vermilion Hills Rural Council* (6); *In re Validity*

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- (1) [1928] A.C. 117.
- (2) [1927] A.C. 934.
- (3) (1878) 3 App. Cas. 1090.

- (4) (1887) 12 App. Cas. 575.
- (5) [1897] A.C. 231.
- (6) [1916] 2 A.C. 569.

of *Manitoba Act* (1); *A.-G. for Manitoba v. A.-G. for Canada*. (2)]

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E. P. Davis K.C. for the respondents. The object of the timber tax was not to raise revenue but to prevent the export of timber. It was an export tax. That is clear, as the Act subjects unexported timber to a light tax, which moreover has not been collected since 1914. A Provincial legislature cannot do indirectly what it has not power to do directly: *Madden v. Nelson and Fort Sheppard Ry.* (3) The Dominion legislature has exclusive power under s. 122 of the Act of 1867 as to duties of custom and excise. Custom duties by accepted definitions are duties imposed upon commodities exported or imported: *Halsbury's Laws of England*, vol. xxiv., p. 587. The legislative power of the Dominion in any matter is exclusive: *A.-G. for Canada v. A.-G. for Ontario* (4); *Union Colliery Co. of British Columbia v. Bryden* (5); *Toronto Electric Commissioners v. Snider*. (6) Although the Dominion in the exercise of its legislative powers may in certain circumstances invade the field of Provincial legislative power, the converse is not the case: *A.-G. for Ontario v. A.-G. for the Dominion* (7); *In re Alberta Ry. Act*. (8) Levying a customs duty upon a commodity is not a taxation of property; it falls within the Dominion powers under s. 91, head 2, as to the regulation of trade and commerce: *A.-G. of British Columbia v. A.-G. of Canada*. (9) The Dominion legislature has dealt with the levying of customs duties upon timber and other commodities in R.S. Can., 1927, c. 63, originally passed in 1897. Further, the tax now in question was not direct taxation within s. 91, head 2, of the Act of 1867. From its nature there would be a tendency to pass it on to a purchaser; that being so, it is not necessary to show that it actually was passed on: *Rex v. Caledonian Collieries*. (10) In that case, as in this, it was contended that the tax was one upon property. [Reference was made also to *In re Hudson's Bay Co. v. Heffernan* (11) and *Security Export Co. v. Hetherington*. (12)]

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- (1) [1924] S.C.R. 317, 322.
- (2) [1925] A.C. 561.
- (3) [1899] A.C. 626.
- (4) [1898] A.C. 700, 714.
- (5) [1899] A.C. 580, 588.
- (6) [1925] A.C. 396, 406.
- (7) [1926] A.C. 348, 359, 360.

- (8) (1913) 48 Can. S.C.R. 9, 22, 29.
- (9) (1922) 64 Can. S.C.R. 377, 382, 384; [1924] A.C. 22.
- (10) [1928] A.C. 358.
- (11) [1917] 3 W.W. Rep. 167.
- (12) [1923] S.C.R. 539; [1924] A.C. 988.

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Hon. Geoffrey Lawrence K.C. in reply. A Provincial legislature has power under s. 92, head 13 (property and civil rights), to protect and conserve the natural products of the Province. If, and so far as, the timber tax is not within s. 92, head 2, it can be justified under s. 92, head 13. The tax was not within the legislative power of the Dominion as to the regulation of trade and commerce, because that head does not authorize the Dominion to legislate as to a particular trade in a Province: *Citizens Insurance Co. of Canada v. Parsons* (1); *Toronto Electric Commissioners v. Snider*. (2)

E. P. Davis K.C. referred on that point to *A.-G. for Canada v. A.-G. for Alberta*. (3)

March 4. The judgment of their Lordships was delivered by

LORD MACMILLAN. The controversy in this appeal relates to the validity of an enactment of the legislature of the Province of British Columbia imposing a tax on timber cut within the Province.

The tax was originally imposed in 1903 in substantially its present form by a Provincial statute of that year, and was subsequently re-enacted with unimportant alterations until in s. 58 of the Forest Act, being c. 93 of the revised statutes of British Columbia, 1924, it assumed the form in which its legality is now for the first time challenged.

The section reads as follows: "58. There shall be due and payable to His Majesty a tax upon all timber cut within the Province, save and except that upon which a royalty is reserved by this Act or the 'Timber Royalty Act,' or that upon which any royalty or tax is payable to the Government of the Dominion, which tax shall be in accordance with the following Schedules:" The first schedule deals with "timber suitable for the manufacture of lumber and shingles," which it classifies into three grades, to be taxed respectively at \$2, \$1.50 and \$1 per 1000 feet, board measure, "provided that a rebate of all the tax over one cent. per thousand feet board measure, shall be allowed when the timber upon which it is due or payable is manufactured or used in the Province." Schedule No. 2 deals

(1) (1881) 7 App. Cas. 96, 112,
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(2) [1925] A.C. 396, 409.
(3) [1916] 1 A.C. 588, 597.

with piles, poles and crib timber, schedule No. 3 with railway-ties, mining props and lagging, pulp-wood and cordwood, and schedule No. 4 with shingle or other bolts of cedar, fir or spruce, taxes of varying amounts being assigned to the different categories. To each of these other schedules, as to the first, is appended a proviso remitting, by way of rebate, all the tax over one cent when the timber is used in the Province.

Sect. 62 of the statute prohibits, under a penalty, the export or removal from the Province of any timber in respect of which any tax is payable to His Majesty in right of the Province unless a permit is obtained from an officer of the Forest Board certifying that all taxes so payable in respect thereof have been paid and confers on the Minister of Lands drastic powers for the enforcement of the Act.

Sect. 127 requires every owner of granted lands and every holder of a timber lease or licence on lands whereon any timber is cut in respect of which any tax is payable, and every person dealing in any timber cut from any such lands and every person operating a mill or other industry which cuts or uses timber upon which any tax is payable, to keep correct books of account of all timber cut for or received by him and to render monthly statements to the district forester, "and the owner, lessee or licensee or person dealing in the timber or operating the mill or other industry as aforesaid shall pay monthly all such sums of money as are shown to be due, to the Minister."

The respondent company are engaged in the business of logging, and sell both locally and for export timber which they cut upon lands granted to them or their predecessors. Having entered into a contract to sell a consignment of their logs to a purchaser in the State of Washington, U.S.A., they applied to the customs officials of the Dominion government for clearance, which was refused on the ground that they did not hold an export permit from the Provincial government. The officers of the forest branch of the Provincial government declined to grant an export permit except on payment of the tax now in question. Thereupon the respondent company instituted the present proceedings against the Attorney-General for British Columbia claiming a declaration that they were under no obligation to pay the tax demanded, and that the relative provisions of the statute were ultra vires of the Provincial legislature.

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The case was heard in the Supreme Court of British Columbia by Morrison C.J. sitting alone, who, after hearing evidence, gave judgment declaring s. 58 of the Forest Act and ss. 62 and 127 "in so far as they purport to implement any tax levied by the said s. 58," to be ultra vires of the Provincial legislature. From that judgment the present appeal is taken.

The validity of the tax was maintained by the appellant on the ground that it was competently imposed by the Provincial legislature as being "direct taxation within the Province in order to the raising of a revenue for Provincial purposes," which is the second class of subjects upon which Provincial legislatures have by s. 92 of the British North America Act, 1867, exclusive power to make laws.

The respondent company, on the other hand, impugned the tax mainly on two grounds—namely: (1.) that it was an indirect tax, and, therefore, not within the competence of the Provincial legislature; and (2.) that it violated ss. 121, 122, 123 and 124 of the Act of 1867. Sect. 121 provides for the free admission into each of the other Provinces of all articles of the growth, produce or manufacture of any one of the Provinces. Sect. 122 enacts that "the customs and excise laws of each Province shall, subject to the provisions of this Act, continue in force until altered by the Parliament of Canada." Sect. 123 deals with customs duties in relation to exportation and importation as between two Provinces. Sect. 124 saves the right of New Brunswick to levy but not to increase certain lumber dues in operation at the Union, "but the lumber of any of the Provinces other than New Brunswick shall not be subjected to such dues."

Their Lordships have on many occasions been called upon to determine questions relating to the constitutional validity of fiscal legislation under the British North America Act and have laid down the principle that in every case the first requisite is "to ascertain the real nature of the tax": *Rex v. Caledonian Collieries*. (1) Now, in the present case, the real nature of the tax in question is transparently obvious. While the statute sets out to impose a tax on all timber cut within the Province it

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(1) [1928] A.C. 358, 362.

proceeds in the relative schedules to reduce the tax by rebate to an illusory amount in the case of timber used in the Province, leaving it to operate to its full effect only on timber exported. The best evidence that the tax was intended to be to all intents and purposes an export tax is afforded by the fact that since 1914 the minute rebated tax on timber used within the Province has not been collected. Indeed, the tax has come to be known as "the timber tax on export," and is so described in the final report of the Royal Commission of inquiry on Timber and Forestry, 1909-10, extracts from which are among the exhibits in the case. The economic effect and, presumably, the object of the tax is to encourage the utilization within the Province of its home-grown timber and to discourage its exportation. The success of the tax, if this be its object, will thus be measured inversely by the revenue which it yields, which is not the normal characteristic of a tax imposed "in order to the raising of a revenue for Provincial purposes."

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Once it is ascertained that the tax is in its real nature an export tax, as their Lordships are satisfied that it is, the task of justifying its imposition by the Provincial legislature becomes one of great difficulty. The appellant admitted that the imposition of customs and excise duties is a matter within the exclusive competence of the Dominion parliament, as, indeed, plainly appears from s. 122 of the British North America Act. The reason for this is, no doubt, that the effect of such duties is not confined to the place where, and the persons upon whom, they are levied, which is perhaps just another way of saying that they are indirect taxes. If then an export tax falls within the category of duties of customs and excise there is an end of the question. Their Lordships are of opinion that according to the accepted terminology and practice of fiscal legislation and administration export duties are ordinarily classed as duties of customs and excise. In Wharton's Law Lexicon "Customs" are defined as "duties charged upon commodities on their importation into or exportation out of a country," and a similar definition is given in Murray's New English Dictionary. An early example of this usage is to be found in Comyn's Digest, 5th ed., 1822, p. 468,

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where, under the heading of "Customs of tonnage and poundage," there is mentioned poundage "on all goods carried out of the King's dominions," with a citation of 12 Car. 2, c. 4, while a modern instance is provided by the Finance Act, 1901, in which s. 3, imposing an export duty on coal, is included in Part I. of the Act, headed "Customs and Excise."

Mr. Lawrence, however, contended that although the tax might accurately be described as an export duty, this did not necessarily negative its being a direct tax within the meaning of the Act. Without reviewing afresh the niceties of discrimination between direct and indirect taxation it is enough to point out that an export tax is normally collected on merchantable goods in course of transit in pursuance of commercial transactions. Whether the tax is ultimately borne by the exporting seller at home or by the importing buyer abroad depends on the terms of the contract between them. It may be borne by the one or by the other. It was said in the present case that the conditions of the competitive market in the United States compelled the exporter of timber from British Columbia to that country to bear the whole burden of the tax himself. That, however, is a matter of the exigencies of a particular market, and is really irrelevant in determining the inherent character of the tax. While it is no doubt true that a tax levied on personal property, no less than a tax levied on real property, may be a direct tax where the taxpayer's personal property is selected as the criterion of his ability to pay, a tax which, like the tax here in question, is levied on a commercial commodity on the occasion of its exportation in pursuance of trading transactions, cannot be described as a tax whose incidence is, by its nature, such that normally it is finally borne by the first payer, and is not susceptible of being passed on. On the contrary, the existence of an export tax is invariably an element in the fixing of prices, and the question whether it is to be borne by seller or purchaser in whole or in part is determined by the bargain made. The present tax thus exhibits the leading characteristic of an indirect tax as defined by authoritative decisions.

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Their Lordships are accordingly of opinion, without entering upon other topics which were discussed at the hearing, that the timber tax in question is an export tax falling within the category of duties of customs and excise, and as such, as well as by reason of its inherent nature as an indirect tax, could not competently be imposed by the Provincial legislature.

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Their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors for appellant: *Gard, Lyell & Co.*

Solicitors for respondents: *Linklaters & Paines.*

[PRIVY COUNCIL.]

PROPRIETARY ARTICLES TRADE }
ASSOCIATION AND OTHERS..... }

APPELLANTS;

AND

ATTORNEY-GENERAL FOR }
CANADA AND OTHERS..... }

RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Legislative power—Trade combinations—Criminal law—Patents—Customs duties—Regulation of trade and commerce—Combines Investigation Act (R.S. Can., 1927, c. 26)—Criminal Code (R.S. Can., 1927, c. 36), s. 498—British North America Act, 1867 (30 & 31 Vict. c. 3), ss. 91, 92.

The Combines Investigation Act (R.S. Can., 1927, c. 26) by s. 36 makes it an indictable offence, punishable by fine or imprisonment, to be a party to the formation or operation of a "combine" as defined by s. 2, that is (shortly stated) a combine which is to the detriment of the public and restrains or injures trade or commerce. Inquiries whether a combine exists are to be conducted by appointed officials, who are given powers to examine books, demand returns, and summon witnesses. By ss. 29 and 30 customs duties may be reduced, and licences revoked, where the duties are used to facilitate a combine, or when the holder of a patent uses it so as unduly to limit manufacture or increase the price of any article.

The Criminal Code (R.S. Can., 1927, c. 36), s. 498, makes it an indictable offence, punishable by fine or imprisonment, to conspire, combine, or agree unduly to limit transportation facilities, restrain commerce, or lessen manufacture or competition.

Held, that s. 498 of the Code and the Act, excepting ss. 29 and 30 were intra vires the Parliament of Canada under the British North America Act, 1867, s. 91, head 27 (criminal law), and ss. 29 and 30 could be supported under s. 91, heads 3 and 22. The legislation being in its pith and substance within enumerated heads of s. 91 it was not material that it affected property and civil rights in the Provinces (s. 92, head 13), or if it affected, which it did not, the administration of justice in the Provinces (s. 92, head 14). The Dominion could employ its own executive officers to carry out legislation which was within its constitutional authority.

It was unnecessary to discuss whether the legislation was intra vires also under s. 91, head 2 (the regulation of trade and commerce), but the Judicial Committee did not assent to a contention that the power under that head was confined to the furtherance of a general power which the Dominion possessed independently of it.

Attorney-General for Ontario v. Hamilton Street Ry. Co. [1903] A.C. 524 followed.

In re Board of Commerce Act, 1919 [1922] 1 A.C. 191 distinguished.

Judgment of the Supreme Court of Canada [1929] S.C.R. 409 affirmed.

**Present*:—LORD BLANESBURGH, LORD MERRIVALE, LORD ATKIN, LORD RUSSELL OF KILLOWEN, and LORD MACMILLAN.

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APPEAL (No. 118 of 1929) by special leave from a judgment of the Supreme Court of Canada (April 30, 1929) upon a reference by the Governor in Council under s. 55 of the Supreme Court Act.

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The questions referred were:—

1. Is the Combines Investigation Act (R.S. Can., 1927, c. 26) ultra vires the Parliament of Canada either in whole or in part, and if so, in what particular or particulars or to what extent? 2. Is s. 498 of the Criminal Code ultra vires the Parliament of Canada, and if so, in what particular or particulars or to what extent?

The provisions of the above named Act are summarized in the judgment of the Judicial Committee.

Sect. 498 of the Criminal Code provides by sub-s. 1 that every one is guilty of an indictable offence, and liable to a penalty or imprisonment, who conspires, combines, agrees or arranges with any other person, or any railway, steamship, or transportation company unduly to limit transportation facilities, or restrain commerce, or unduly lessen manufacturing, or unduly prevent competition; by sub-s. 2, the section is not to apply to combinations of workmen or employees for their own reasonable protection.

The Supreme Court of Canada answered both questions in the negative. Judgments to that effect were delivered by Duff J. (concurred in by Rinfret and Smith JJ.) and by Newcombe J. (concurred in by Mignault and Lamont JJ.). The proceedings are reported [1929] S.C.R. 409.

1930. May 29, 30; June 2, 3, 5. *Tilley K.C.* for the appellant Association; *Tilley K.C.* (with him *Frank Gahan*) for the appellant the Attorney-General for Ontario; *Hon. Geoffrey Lawrence K.C.* (with him *Maurice Alexander*) for the appellant the Attorney-General for Quebec. The legislation was ultra vires the Parliament of Canada, as it related to matters within the exclusive powers of the Provincial legislatures under the British North America Act, 1867, s. 91, more particularly heads 13 (property and civil rights) and 14 (administration of justice), and it did not fall within the Dominion powers under s. 91, head 27 (criminal law), or head 2 (regulation of trade and commerce) or otherwise. The legislation does not essentially differ from that which the Board

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held invalid in *In re Board of Commerce Act, 1919*. (1) It is invalid upon the grounds there stated, and upon a consideration of the judgments in *Toronto Electric Commissioners v. Snider* (2); *Attorney-General for Canada v. Attorney-General for Alberta* (*The Insurance Act* case) (3); and *Attorney-General for Ontario v. Reciprocal Insurers*. (4) The offences created did not, in the words of *In re Board of Commerce Act, 1919* (5), "belong to the domain of criminal jurisprudence." They included acts and agreements which were not necessarily civilly unlawful: *Weidman v. Shragge* (6); *North Western Salt Co. v. Electrolytic Alkali Co.* (7); *Sorrell v. Smith*. (8) Further, by s. 92, heads 14 and 15, there is assigned to the Provincial legislatures a field of Provincial criminal law distinct from that of the Dominion under s. 91, head 27. That is illustrated by *Hodge v. The Queen* (9); *Attorney-General for Ontario v. Attorney-General for the Dominion* (10); *Attorney-General of Manitoba v. Manitoba Licence Holders' Association* (11); *Canadian Pacific Wine Co. v. Tuley* (12); *Rex v. Nat Bell Liquors* (13); *Reg. v. Wason*. (14) Provincial legislatures have exclusive authority to interfere with civil rights by prohibiting under penalties conduct otherwise lawful. Where an act or omission is in its nature criminal or unlawful, to make it an offence does not interfere with any civil right in the Provinces; that consideration marks the distinction between the respective powers as to the criminal law.

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The legislation cannot be justified under s. 91, head 2 (the regulation of trade and commerce), for the reasons given by the Board in the *Board of Commerce* case. (15) The effect of that judgment is that s. 92, head 2, can be invoked only in the case of legislation which falls within a power which the Dominion legislature has independently of that head. That view was again stated in *Toronto Electric Commissioners v. Snider*. (16)

There was no such emergency as might have justified the interference with property and civil rights under the

(1) [1922] 1 A.C. 191.

(2) [1925] A.C. 396.

(3) [1916] 1 A.C. 588.

(4) [1924] A.C. 328.

(5) [1922] 1 A.C. 191, 198, 199.

(6) [1912] 46 Can. S.C.R. 1, 33.

(7) [1914] A.C. 461, 469, 470.

(8) [1925] A.C. 700.

(9) (1883) 9 App. Cas. 117.

(10) [1896] A.C. 348.

(11) [1902] A.C. 73.

(12) [1921] 2 A.C. 417.

(13) [1922] 2 A.C. 128.

(14) (1889) 17 Ont. A.R. 22.

(15) [1922] 1 A.C. 191, 198.

(16) [1925] A.C. 396, 410.

general power to make laws for the peace, order and government of Canada: *Fort Frances Pulp and Power Co. v. Manitoba Free Press Co.* (1)

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Rowell K.C. (with him *Varcoe*) for the respondent Attorney-General for Canada. Under the concluding paragraph of s. 91 legislation within one of its enumerated heads is not to be deemed to come within any of the heads of s. 92; Dominion legislation, including such provisions as are necessary to carry out its scheme, over-rides the Provincial powers as to property and civil rights: *Attorney-General of Ontario v. Attorney-General for Canada* (2); *Royal Bank of Canada v. Larue*. (3) The legislation now in question was in its "pith and substance" (*Union Colliery Co. v. Bryden* (4)) within s. 92, head 27 (criminal law and procedure), and, as to ss. 29 and 30 of the Act, within head 3 (and s. 122) and head 22. Under s. 91, head 27, the Dominion Parliament can bring any act within the domain of the criminal law if it deems it in the interest of Canada to do so, and the legislation over-rides Provincial legislation: *Lord's Day Alliance of Canada v. Attorney-General for Manitoba*. (5) In *Attorney-General for Ontario v. Hamilton Street Ry. Co.* (6) the Board held that the words "the criminal law" in s. 91, head 27, meant the criminal law in its widest sense. Later decisions of the Board throw no doubt upon that view, which had already been expressed by the Supreme Court of Canada in *L'Association St. Jean-Baptiste de Montréal v. Brault* (7), and has since been followed in *Ouimet v. Bazin* (8); *Re Race-Tracks and Betting*. (9) No offence is created by s. 498 of the Code or s. 32 of the Act unless the acts or agreements are to the detriment of the public; it must be proved that they are so: *Attorney-General of Australia v. Adelaide Steamship Co.* (10) The Provincial power under s. 92, head 15, to impose penalties for breaches of a Provincial statute, does not limit the Dominion power under s. 91, head 27. If there is an overlapping of powers Dominion legislation would be valid even if the field were occupied, which here it was not. The Provincial statutes as to the liquor

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(1) [1923] A.C. 695.

(2) [1894] A.C. 189, 200, 201.

(3) [1928] A.C. 187, 198.

(4) [1899] A.C. 580, 587.

(5) [1925] A.C. 384, 394.

(6) [1903] A.C. 524.

(7) (1900) 30 Can. S.C.R. 598,
608.

(8) (1911) 46 Can. S.C.R. 502.

(9) (1921) 49 Ont. L.R. 339.

(10) [1913] A.C. 781.

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trade were held valid as local matters falling under s. 92, head 16, not as Acts dealing with civil rights.

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A comparison of the legislation now in question with the two Acts considered in the *Board of Commerce case* (1) shows that all the features which were held to be objectionable have been omitted. There is moreover an essential distinction. The former legislation was held invalid as an interference with matters assigned to the Provincial legislatures sought to be brought within the Dominion powers by ancillary provisions imposing penalties. Here the primary intention and effect is to make certain acts, when they are to the public detriment, offences; the provisions as to investigations being reasonably necessary for carrying out that primary intention. If any of those provisions are not directly within s. 91, head 27, they nevertheless are valid as being ancillary provisions to carry out the scheme of legislation: *Grand Trunk Ry. Co. v. Attorney-General of Canada* (2); *Attorney-General for Quebec v. Nipissing Central Ry. Co.* (3); *Attorney-General for Canada v. Attorney-General for British Columbia.* (4)

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The legislation also fell within s. 91, head 2—the regulation of trade and commerce. It is well settled that s. 91, head 2, does not enable the Dominion Parliament to interfere with a particular trade or local matter in a Province. But this was a matter affecting Canadian trade generally. The observations in the *Board of Commerce case* (5) and in *Snider's case* (6) were not intended to impose any further limitation on the power; the observations in the former case were explained by Newcombe J. in the judgment appealed from. (7) If the observations carry the meaning suggested for the appellants they were obiter, and contrary to the express provisions of the Act of 1867. Further, the Dominion Parliament, having power to impose tariffs, could legislate under head 2 to prevent the tariffs giving rise to combinations preventing competition and raising prices: *Wampole & Co. v. Karn Co.* (8); *Standard Oil Co. v. U.S.* (9)

(1) [1922] 1 A.C. 191.

(2) [1907] A.C. 65.

(3) [1926] A.C. 715.

(4) [1930] A.C. 111, 118.

(5) [1922] 1 A.C. 191, 198.

(6) [1925] A.C. 396, 410.

(7) [1929] S.C.R. 409, 421, 422.

(8) (1906) 11 Ont. L.R. 619, 628.

(9) (1911) 221 U.S. 1, 49, 50.

Tilley K.C. replied.

1931. Jan. 29. The judgment of their Lordships was delivered by

LORD ATKIN. This is an appeal from the Supreme Court of Canada on a reference by the Governor in Council under s. 55 of the Supreme Court Act. The questions submitted to the Court were:—

1. Is the Combines Investigation Act, R.S. Can., 1927, c. 26, *ultra vires* the Parliament of Canada either in whole or in part, and if so, in what particular or particulars or to what extent?

2. Is s. 498 of the Criminal Code *ultra vires* the Parliament of Canada, and if so, in what particular or particulars or to what extent?

The Supreme Court answered both questions in the negative.

The appellants are the Proprietary Articles Trade Association, who had been found by a Commission appointed under the Combines Investigation Act to have been party to a combine as defined in the Act, and had been admitted to be heard on the reference under s. 55, sub-s. 4, of the Supreme Court Act. The other appellants are the Attorney-General for the Province of Quebec and the Attorney-General for the Province of Ontario. The reference involved important questions of constitutional law within the Dominion, and their Lordships have had the assistance of full and able argument in which all the numerous relevant authorities were brought to their notice. After careful consideration of the arguments and the authorities their Lordships are of opinion that the decision of the Supreme Court is right.

In determining judicially the distribution of legislative powers between the Dominion and the Provinces made by the two famous ss. 91 and 92 of the British North America Act two principles have to be observed. First, the accepted canon of construction as to the general effect of the sections must be maintained. This is that the general powers of legislation for the peace, order and good government of Canada are committed to the Dominion Parliament, though they are subject to the exclusive powers of legislation committed to the Provincial legislatures and enumerated in

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s. 92. But the Provincial powers are themselves qualified in respect of the classes of subjects enumerated in s. 91, as particular instances of the general powers assigned to the Dominion. Any matter coming within any of those particular classes of subjects is not to be deemed to come within the classes of matters assigned to the Provincial legislatures. This almost reproduces the express words of the sections, and this rule is well settled.

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The second principle to be observed judicially was expressed by the Board in 1881, "it will be a wise course . . . to decide each case which arises as best they can, without entering more largely upon an intepretation of the statute than is necessary for the decision of the particular question in hand": *Citizens Insurance Co. of Canada v. Parsons*. (1) It was restated in 1914: "The structure of ss. 91 and 92, and the degree to which the connotation of the expressions used overlaps, render it, in their Lordships' opinion, unwise on this or any other occasion to attempt exhaustive definitions of the meaning and scope of these expressions. Such definitions, in the case of language used under the conditions in which a constitution such as that under consideration was framed, must almost certainly miscarry": *John Deere Plow Co. v. Wharton*. (2) The object is as far as possible to prevent too rigid declarations of the Courts from interfering with such elasticity as is given in the written constitution.

With these two principles in mind the present task must be approached.

The claim of the Dominion is that the Combines Act and s. 498 of the Criminal Code can be supported as falling within two of the enumerated classes in s. 91—namely, "(2.) The regulation of trade and commerce," and "(27.) The criminal law, except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters." Reliance is also placed on "(3.) The raising of money by any mode or system of taxation," "(22.) Patents of invention and discovery," and on the general power of legislating for peace, order and good government. The appellants, on the other hand, say that the Act and the section of the Code violate the exclusive right of the

(1) (1881) 7 App. Cas. 96, 109.

(2) [1915] A.C. 330, 338.

Provinces under s. 92 to make laws as to "(13.) property and civil rights in the Province," and "(14.) the administration of justice in the Province."

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Both the Act and the section have a legislative history, which is relevant to the discussion. Their Lordships entertain no doubt that time alone will not validate an Act which when challenged is found to be ultra vires; nor will a history of a gradual series of advances till this boundary is finally crossed avail to protect the ultimate encroachment. But one of the questions to be considered is always whether in substance the legislation falls within an enumerated class of subject, or whether on the contrary in the guise of an enumerated class it is an encroachment on an excluded class. On this issue the legislative history may have evidential value.

The history of the Act and the section of the Code so far as it has been laid before their Lordships is as follows: In 1888 a select committee of the House of Commons of Canada reported upon the existence of combinations in manufacturers, trade and insurance in Canada, and that legislative action would be justified for suppressing the evils resulting from these and similar combinations and monopolies. In 1889 Parliament passed an Act for the prevention and suppression of combinations formed in restraint of trade (52 Vict. c. 41), which made it a misdemeanour punishable with fine or imprisonment to be a party to a combination as defined in the Act, for this purpose sufficiently described as in restraint of trade. One may complete the history of the section by recording that in 1892 the material section of the Act of 1889 was placed in the Criminal Code as s. 520. In 1899 the wording of the definition was varied by omitting in certain phrases the words "unduly" and "unreasonably": but in 1900 the words were restored, and the section has since stood in the Criminal Code in the form then enacted and now forms s. 498 of the Criminal Code (R.S. Can., 1927, c. 36), which is the section attacked.

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To revert to the Act, in 1897 by s. 18 of the Customs Tariff Act of that year the Governor in Council was authorized to empower any judge to hold an inquiry as to whether with regard to any article of commerce there existed any combination to unduly enhance (the split infinitives are throughout the work of the legislature) the price of such

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article or otherwise to unduly promote the advantage of the producers at the expense of the consumers. The judge was empowered to compel the attendance of witnesses, and the production of documents. Upon his report the Governor in Council was empowered to reduce or withdraw any customs duty which facilitated such a combination. The powers conferred by this section appear to be the germ from which have sprung the more elaborate powers conferred by more recent Acts. In 1904 by the Inland Revenue Amendment Act (4 Edw. 7, c. 17), the Minister of Inland Revenue was empowered to withdraw from a manufacturer any excise licence in case of a sale or consignment by him of goods under restrictive conditions as there defined. In 1907 by the Customs Tariff Act of that year, the power of the Governor in Council to appoint a judge to inquire into the existence of combinations was enlarged: and his power to deal with any customs duty facilitating such combination was extended to cases where the existence of a combination appeared as a result of a judgment of any of the Courts. In 1910 the Combines Investigation Act (9 & 10 Edw. 7, c. 9) was passed. It made more elaborate provision for an investigation into the existence of trade combinations and provided additional remedies. It contained a definition of "combine" in very general terms. An investigation was to be ordered by a judge on application by persons interested. When ordered the investigation was to be held by a Board of three Commissioners appointed ad hoc, who were armed with large powers of obtaining evidence. Their report was to be published. If any person was reported to have been guilty of doing the acts already prohibited in s. 520 of the Criminal Code and continued so to offend after the report, he was to be guilty of an indictable offence and liable to a penalty not exceeding \$1000 a day for each day the offence continued. The Governor in Council's power to reduce or withdraw customs duty was reaffirmed; and if a patent was used so as to unduly assist a combination it was made liable to revocation.

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In 1919 were passed two Acts of some importance in this history, inasmuch as they have both been held by this Board to have been ultra vires the Dominion Parliament. The first is the Board of Commerce Act (9 & 10 Geo. 5, c. 37). Under this Act, a permanent Board of

three Commissioners was set up which was to be a court of record. The Board might sit anywhere in Canada, and either in public or in camera. Its duties were to have charge of the general administration of the contemporaneous Act, the Combines and Fair Prices Act of 1919 (which is the second Act above referred to), and to investigate or make orders as it might be empowered by either Act, or from time to time by the special direction of the Governor in Council. It had power to make future, contingent or conditional orders, either final or interim: and its orders could be enforced by being made a rule of Court, either of the Exchequer Court or any superior Provincial Court. Any order might be reviewed and varied or rescinded by the Governor in Council: and there were provisions by which questions of jurisdiction and questions of law could be brought by way of appeal before the Supreme Court of Canada. Large powers of securing the attendance of witnesses and the production of documents were given to the Board.

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The second Act of 1919, above referred to, is the Combines and Fair Prices Act (9 & 10 Geo. 5, c. 45), with the administration of which the Board of Commerce, as above constituted, was specially charged. The Act was divided into two parts, Combines and Fair Prices. A combine was defined as having only reference to such combines as thereafter defined as had, in the opinion of the Board of Commerce, operated, or were likely to operate "to the detriment of or against the interest of the public, consumers, producers, or others," and subject to such qualification was defined in terms which appear to be substantially wider than those in the Act of 1910, or in the Criminal Code, and include fixing a common price, or enhancing the price or cost of articles and lessening competition within any particular district, or generally, in production, sale or supply. The first part, dealing with combines, empowered the Board to restrain and prohibit the formation and operations of combines. For this purpose, the Board, of its own initiative, or a Commissioner, on application, could order an investigation into the existence of a combine. The Board itself held the necessary inquiry, and if of opinion that a combine existed could order the person or persons complained of to desist from the acts forming part of the operations of the combine. Disobedience constituted an

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indictable offence and exposed the party guilty to a penalty not exceeding \$1000 a day. Whenever, in the opinion of the Board, such an offence had been committed, the Board had power to remit the record to the Attorney-General of the Province where it had been committed with a recommendation to prosecute, but no prosecution was to be commenced for such an offence or under s. 498 of the Code without the written authority of the Board. The powers of the Governor in Council to reduce customs duties and the power of the Court to revoke patents in cases of combines, were re-enacted. The second part, dealing with fair prices, was restricted to the control of necessities of life defined in the Act as staple and ordinary articles of food, clothing and fuel, including the material of which they might in part be manufactured, and such other articles as the Board might prescribe. In respect of such articles, no person was to accumulate or withhold from sale any amount in excess of what was necessary for the consumption of his household or the ordinary purposes of his business: and any excess was to be offered for sale at prices not higher than were reasonable or just. The Board were directed to inquire into and restrain and prohibit any breach of the Act, or the making of unfair profits on necessities of life. An unfair profit was to be deemed to be made when the Board declared that it had been made. Elaborate powers of inquiry, and of ordering statistical returns were entrusted to the Board. The Board might make declarations as to the guilt of any person concerned, and might order or prohibit the doing or omission of any act connected with the offence. Disobedience to such orders was an indictable offence, subject to a continuing penalty not exceeding \$1000 a day, or to imprisonment for a term not exceeding two years. Similar provisions to those in Part I. were enacted as to prosecutions.

Their Lordships have dealt at some length with the provisions of the Acts of 1919 inasmuch as the appellants relied strongly on the judgment of the Board, in *In re Board of Commerce Act, 1919* (1), which held both Acts to be ultra vires. Unless there are material distinctions between those Acts and the present, it is plainly the duty of this Board to follow the previous decision. It is necessary therefore to contrast the provisions of the Acts of

1919 with the provisions of the Act now in dispute. The judgment above referred to was given in November, 1921, and on June 13, 1923, there was passed the Combines Investigation Act, 1923 (13 & 14 Geo. 5, c. 9), which repealed the two Acts of 1919 and enacted provisions which were substantially those of the present Act. The Act of 1923 was revised in 1927 and appears substantially in the original form in the revised Act—the Combines Investigation Act (R.S. Can., 1927, c. 26). By this Act “combines” are defined as combines “which have operated or are likely to operate to the detriment or against the interest of the public, whether consumers, producers or others,” and which “are mergers, trusts or monopolies so-called” or result from the acquisition by any person of any control over the business of any other person or result from any agreement which has the effect of limiting facilities for production, manufacture or transport or of fixing a common price, or enhancing the price of articles or of preventing or lessening competition in or substantially controlling production or manufacture, or “otherwise restraining or injuring trade or commerce.” By the Act the Governor in Council may name a Minister of the Crown to be charged with the administration of the Act, and must appoint a registrar of the Combines Investigation Act. The registrar is charged with the duty to inquire whether a combine exists, whenever an application is made for that purpose by six persons supported by evidence, or whenever he has reason to believe that a combine exists, or whenever he is directed by the Minister so to inquire. Provision is made for holding further inquiry by Commissioners appointed from time to time; and the registrar and a commissioner are armed with large powers of examining books and papers, demanding returns, and summoning witnesses. The proceedings are to take place in private unless the Minister directs that they should be public. The registrar is to report the result of any inquiry to the Minister, and every commissioner is to report to the registrar who is to transmit the report to the Minister. Any report of a commissioner is to be made public unless the commissioner reports that public interest requires publication to be withheld, in which case the Minister has a discretion as to publicity.

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By s. 32 "Every one is guilty of an indictable offence and liable to a penalty not exceeding ten thousand dollars or to two years' imprisonment, or if a corporation to a penalty not exceeding twenty-five thousand dollars, who is a party or privy to or knowingly assists in the formation or operation of a combine within the meaning of this Act. (2.) No prosecution for any offence under this section shall be commenced otherwise than at the instance of the Solicitor-General of Canada or of the Attorney-General of a Province." By subsequent sections, refusal to obey orders as to discovery and other interference with an investigation are made offences for the most part subject to summary conviction and appropriate penalties are imposed.

Under a group of ss. 29 to 31, entitled "Remedies" powers are given as in previous Acts for the Governor in Council to reduce customs duties, and for the Exchequer Court to revoke licences where the duties are used to facilitate a combine or when the holder of a patent uses it so as unduly to limit the manufacture, or enhance the price of any article. Power is given to the Minister to remit to the Attorney-General of a Province any returns made in pursuance of the Act or any report of the registrar, or any commissioner; and if no action is taken thereon by the Attorney-General of the Province, the Solicitor-General (representing the Dominion) may take the appropriate action.

In their Lordships' opinion s. 498 of the Criminal Code and the greater part of the provisions of the Combines Investigation Act fall within the power of the Dominion Parliament to legislate as to matters falling within the class of subjects, "the criminal law including the procedure in criminal matters" (s. 91, head 27). The substance of the Act is by s. 2 to define, and by s. 32 to make criminal, combines which the legislature in the public interest intends to prohibit. The definition is wide, and may cover activities which have not hitherto been considered to be criminal. But only those combines are affected "which have operated or are likely to operate to the detriment or against the interest of the public, whether consumers, producers, or others"; and if Parliament genuinely determines that commercial activities which can be so described are to be suppressed in the public interest, their Lordships see no reason why Parliament should not make them

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crimes. "Criminal law" means "the criminal law in its widest sense": *Attorney-General for Ontario v. Hamilton Street Ry. Co.* (1) It certainly is not confined to what was criminal by the law of England or of any Province in 1867. The power must extend to legislation to make new crimes. Criminal law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the State. The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: Is the act prohibited with penal consequences? Morality and criminality are far from co-extensive; nor is the sphere of criminality necessarily part of a more extensive field covered by morality—unless the moral code necessarily disapproves all acts prohibited by the State, in which case the argument moves in a circle. It appears to their Lordships to be of little value to seek to confine crimes to a category of acts which by their very nature belong to the domain of "criminal jurisprudence"; for the domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the State to be crimes, and the only common nature they will be found to possess is that they are prohibited by the State and that those who commit them are punished. Their Lordships agree with the view expressed in the judgment of Newcombe J. (2) that the passage in the judgment of the Board in the *Board of Commerce* case (3) to which allusion has been made, was not intended as a definition. In that case their Lordships appear to have been contrasting two matters—one obviously within the line, the other obviously outside it. For this purpose it was clearly legitimate to point to matters which are such serious breaches of any accepted code of morality as to be obviously crimes when they are prohibited under penalties. The contrast is with matters which are merely attempts to interfere with Provincial rights, and are sought to be justified under the head of "criminal law" colourably and merely in aid of what is in substance an encroachment. The Board considered that the Combines and Fair Prices Act of 1919 came within the latter class, and was in substance an encroachment on the exclusive power of the Provinces to legislate

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(1) [1903] A.C. 524.

(2) [1929] S.C.R. 409, 422.

(3) [1922] 1 A.C. 191, 198, 199.

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on property and civil rights. The judgment of the Board arose in respect of an order under Part II. of the Act. Their Lordships pointed out five respects in which the Act was subject to criticism. It empowered the Board of Commerce to prohibit accumulations in the case of non-traders; to compel surplus articles to be sold at prices fixed by the Board; to regulate profits; to exercise their powers over articles produced for his own use by the householder himself; to inquire into individual cases without applying any principles of general application. None of these powers exists in the provisions now under discussion. There is a general definition, and a general condemnation; and if penal consequences follow, they can only follow from the determination by existing courts of an issue of fact defined in express words by the statute. The greater part of the statute is occupied in setting up and directing machinery for making preliminary inquiries whether the alleged offence has been committed. It is noteworthy that no penal consequences follow directly from a report of either commissioner or registrar that a combine exists. It is not even made evidence. The offender, if he is to be punished, must be tried on indictment, and the offence proved in due course of law. Penal consequences, no doubt, follow the breach of orders made for the discovery of evidence; but if the main object be *intra vires*, the enforcement of orders genuinely authorized and genuinely made to secure that object are not open to attack.

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It is, however, not enough for Parliament to rely solely on the powers to legislate as to the criminal law for support of the whole Act. The remedies given under ss. 29 and 30 reducing customs duty and revoking patents have no necessary connection with the criminal law and must be justified on other grounds. Their Lordships have no doubt that they can both be supported as being reasonably ancillary to the powers given respectively under s. 91, head 3, and affirmed by s. 122, "the raising of money by any mode or system of taxation," and under s. 91, head 22, "patents of invention and discovery." It is unfortunately beyond dispute that in a country where a general protective tariff exists persons may be found to take advantage of the protection, and within its walls form combinations that may work to the public disadvantage. It is an elementary point of self-preservation that the legislature

which creates the protection should arm the executive with powers of withdrawing or relaxing the protection if abused. The same reasoning applies to grants of monopoly under any system of patents.

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The view that their Lordships have expressed makes it unnecessary to discuss the further ground upon which the legislation has been supported by reference to the power to legislate under s. 91, head 2, for "The regulation of trade and commerce." Their Lordships merely propose to disassociate themselves from the construction suggested in argument of a passage in the judgment in the *Board of Commerce* case (1) under which it was contended that the power to regulate trade and commerce could be invoked only in furtherance of a general power which Parliament possessed independently of it. No such restriction is properly to be inferred from that judgment. The words of the statute must receive their proper construction where they stand as giving an independent authority to Parliament over the particular subject-matter. But following the second principle noticed in the beginning of this judgment their Lordships in the present case forbear from defining the extent of that authority. They desire, however, to guard themselves from being supposed to lay down that the present legislation could not be supported on that ground.

If then the legislation in question is authorized under one or other of the heads specifically enumerated in s. 91, it is not to the purpose to say that it affects property and civil rights in the Provinces. Most of the specific subjects in s. 91 do affect property and civil rights but so far as the legislation of Parliament in pith and substance is operating within the enumerated powers there is constitutional authority to interfere with property and civil rights. The same principle would apply to s. 92, head 14, "the administration of justice in the Province," even if the legislation did, as in the present case it does not, in any way interfere with the administration of justice. Nor is there any ground for suggesting that the Dominion may not employ its own executive officers for the purpose of carrying out legislation which is within its constitutional

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(1) [1922] 1 A.C. 191, 198.

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} authority, as it does regularly in the case of revenue officials and other matters which need not be enumerated.

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FOR CANADA. Their Lordships are of opinion that the Supreme Court of Canada were right in answering both questions in the negative, and that this appeal should be dismissed, and they will humbly advise His Majesty accordingly.

Solicitors for appellant Association: *Lawrence Jones & Co.*

Solicitors for appellant Attorneys-General: *Blake & Redden.*

Solicitors for respondent Attorney-General for Canada:
Charles Russell & Co.

[PRIVY COUNCIL.]

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ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Vesting and control of public lands—Rupert's Land and North-Western Territory—Order in Council of June 23, 1870—Alienations by Dominion—Claim by Province of Saskatchewan—Validity of Dominion legislation—Dominion Lands Act (35 Vict. c. 23, Dom.)—British North America Act, 1867 (30 & 31 Vict. c. 3), ss. 109, 146—Rupert's Land Act, 1868 (31 & 32 Vict. c. 105), s. 5.

The effect of the Order in Council of June 23, 1870, whereby Rupert's Land and the North-Western Territory were admitted into and became part of the Dominion of Canada, and of s. 5 of the Rupert's Land Act, 1868, was that the lands therein which were then vested in the Crown, and now are within the boundaries of the Province of Saskatchewan, became so vested in the right of the Dominion, and the Dominion was given full control to administer them for the purposes of Canada as a whole, not merely for the inhabitants of the area.

The Dominion Lands Act, 1872, and s. 21 of the Alberta and Saskatchewan Acts, 1905, were therefore validly enacted by the Parliament of Canada.

Judgment of the Supreme Court of Canada [1931] S.C.R. 263 affirmed.

APPEAL (No. 37 of 1931) by special leave from a judgment of the Supreme Court of Canada (February 3, 1931) in answer to questions referred to that Court by the Governor-General in Council under s. 55 of the Supreme Court Act.

The reference was made pursuant to an agreement between the Governments of the Dominion of Canada and the Province of Saskatchewan, dated March 20, 1930. That Province was established by the Saskatchewan Act, 1905, being formed out of a portion of Rupert's Land and the North-Western Territory, which were admitted into and became part of the Dominion by an Order in Council of June 23, 1870. The reference arose out of a claim by the Province in respect of alienations of part of the natural resources of the land within its boundaries between the date of the Order in Council and the establishment of the Province.

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**Present:* VISCOUNT DUNEDIN, LORD HANWORTH M.R., LORD ATKIN, LORD RUSSELL of KILLOWEN, and LORD MACMILLAN.

(1) The parties to appeals from judgments delivered in answer to questions referred by the Governor-General or Lieutenant-Governors being always the Attorneys-General, it is thought that identification of these appeals will be easier if they are entitled in the matter referred.

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The questions submitted are set out in the judgment of the Judicial Committee, from which the facts and considerations material to their answer appear.

The answer of the Supreme Court to each of the questions was in favour of the Dominion. Newcombe J. delivered a judgment in which Duff, Rinfret, Lamont, Smith and Cannon JJ. concurred. Anglin C.J. agreed with the reasons of that judgment, but whereas the majority answered question 1 (d) "not otherwise than as sharing in any benefit which might accrue to them under the dispositions of Parliament," he was of opinion that it should be answered by a simple negative; with the other answers he concurred. The proceedings are reported at [1931] S.C.R. 263.

The Attorneys-General for Saskatchewan and Alberta appealed.

1931. July 7, 9, 10. *MacPherson K.C.* (Attorney-General for Saskatchewan) and *Bence K.C.* (with them *Barr K.C.* and *Frank Gahan*) for the appellants. At the time of the Order in Council Rupert's Land and the North-Western Territory were recognized as being colonies. It is the established policy of the Empire to appropriate the land revenue of a colony to the benefit of its inhabitants, even if the colony is not self-governing. That principle was applied in 1858 when the colony of British Columbia was founded. As to that part of the area which became the Province of Manitoba, the Manitoba Act, 1868, which was ratified by the British North America Act, 1871, provided expressly that all ungranted lands should be administered by the Dominion for its own purposes, but there was no corresponding enactment as to the remaining parts of the area. By s. 146 of the Act of 1867 the terms upon which the area was transferred were to be "subject to the provisions of this Act." The Act of 1867 draws a marked distinction between legislative powers and proprietary right; the fact that the Dominion acquired legislative power over the area is no indication that it acquired any proprietary right: *Att.-Gen. for Canada v. Atts.-Gen. for Provinces*. (1) The intention of the Act, as shown more particularly by s. 109, was that each Province should enjoy the entire beneficial interest of the Crown in all lands within

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its boundaries, subject only to the specific rights therein given to the Dominion by s. 108 and s. 117: *St. Catherine's Milling and Lumber Co. v. The Queen* (1); *Mercer v. Att.-Gen. for Ontario*. (2) That principle is not confined to the original Provinces: *Att.-Gen. of British Columbia v. Att.-Gen. of Canada*. (3) Effect can only be given to the above words in s. 146 by restricting the beneficial interest of the Dominion in the area in question to that which it had under the Act in the case of the public lands of the original Provinces. Even if the area vested in the Dominion for the purpose of administration, s. 5 of the Rupert's Land Act, 1868, shows that it was to be administered for the benefit of "His Majesty's subjects and others therein." In so far as the Dominion Lands Act, 1872, and s. 21 of the Alberta and Saskatchewan Acts, 1905, assumed a greater beneficial interest in the Dominion they were ultra vires. In *Att.-Gen. for Alberta v. Att.-Gen. for Canada* (4) the Board considered the effect of s. 21 of the Alberta Act, 1905, not its constitutional validity; that was assumed for the purpose of the judgment. The approval of the judgment of Anglin C.J. in *Trusts and Guarantee Co. v. The King* (5) was confined to the point that registration of title to land did not affect the nature of its tenure.

Hon. Geoffrey Lawrence K.C. (with him *Milner K.C.* and *Plaxton K.C.*) for the respondent. By the Order in Council of June 23, 1870, read with s. 146 of the British North America Act, s. 5 of the Rupert's Land Act, 1868, and the addresses referred to therein, the area in question was "admitted into and became part of the Dominion," and the Dominion was given full legislative control over it; the legislative authority was reaffirmed by s. 4 of the British North America Act, 1871. Under the above Acts and instruments the Parliament of Canada had the right to dispose of the Crown lands within the area, and to appropriate the revenue so arising to Dominion purposes. By the Manitoba Act, 1868, ratified by the Imperial Parliament in 1871, the Crown lands in that part of the area which was formed into the Province of Manitoba were to be administered for the purposes of the Dominion; it is unlikely that the intention was different as to that part

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(1) (1888) 14 App. Cas. 46.
(2) (1881) 5 Can. S.C.R. 538,
645.

(3) (1888) 14 App. Cas. 295.
(4) [1928] A.C. 475.
(5) (1916) 54 Can. S.C.R. 107.

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which was not then formed into a Province. The words "subject to the provisions of this Act" in s. 146 of the British North America Act, 1867, meant merely that the agreed terms of transfer were to be consistent with the provisions of the Act. They do not make s. 109 applicable, as that section refers specifically to the original Provinces named in it. There was an express provision in the Order in Council creating the Province of British Columbia, placing it in the same position as to its public lands as the named Provinces: *Att.-Gen. of British Columbia v. Att.-Gen. of Canada*. (1) By s. 91, head 1, of the Act of 1867, the Parliament of Canada has exclusive legislative authority in respect of "the public debt and property." The appellants' contentions conflict with the validity of the Dominion Lands Act, 1872, the powers under which have been exercised for a very long period, also with s. 21 of the Saskatchewan and Alberta Acts, 1905. The validity of s. 21 of the Alberta Act was recognized by the Board in *Att.-Gen. for Alberta v. Att.-Gen. for Canada*. (2) In *Trusts and Guarantee Co. v. The King* (3), referred to in the judgment, the Supreme Court considered and rejected a contention that the Crown lands within the boundaries of Alberta never vested in the right of the Dominion. The terms of s. 5 of the Rupert's Land Act, 1868, cannot be construed as giving prospective Provinces to be established any rights in the land revenue. No trust of that nature can be implied from the circumstances: *In re Southern Rhodesia*. (4) [Reference was made also to *In re s. 17 of Alberta Act*. (5)]

MacPherson K.C. replied.

Oct. 22. The judgment of their Lordships was delivered by

LORD ATKIN. This appeal from the Supreme Court of Canada arises upon an order of reference pursuant to s. 55 of the Supreme Court Act, made by the Governor-General in Council, dated May 3, 1930, to determine questions that had arisen between the Dominion and the Province of Saskatchewan. The questions to be answered are to be

(1) 14 App. Cas. 295, 304.

(2) [1928] A.C. 475.

(3) 54 Can. S.C.R. 107, 121.

(4) [1919] A.C. 211, 231, 232.

(5) [1927] S.C.R. 364.

found in the following formal submission agreed between the Dominion and the Province and annexed to the order of reference:—

“Whereas under an agreement made between the Government of the Dominion of Canada, of the one part, and the Government of the Province of Saskatchewan of the other part, provision is made for the submission to the Supreme Court of Canada, for its consideration, of certain questions agreed upon; And whereas it is admitted for the purpose of this submission that (a) The area now lying within the boundaries of the Province of Saskatchewan formed a part of Rupert’s Land and the North-Western Territory, which were admitted into and became a part of the Dominion of Canada under Order in Council of June 23, 1870. (b) From the coming into force of the said Order in Council until September 1, 1905, portions of the said area were from time to time alienated by the Dominion of Canada. (c) Throughout the following questions the term ‘lands’ means and includes ‘lands, mines, minerals and royalties incident thereto.’

The following questions are submitted for the consideration of the Supreme Court pursuant to s. 55 of the Supreme Court Act:—

1. Upon Rupert’s Land and the North-Western Territory being admitted into and becoming a part of the Dominion of Canada under Order in Council of June 23, 1870, were all lands then vested in the Crown and now lying within the boundaries of the Province of Saskatchewan vested in the Crown: (a) In the right of the Dominion of Canada; or (b) in the right of any province or provinces to be established within such area; or (c) to be administered for any province or provinces to be established within such area; or (d) to be administered for the benefit of the inhabitants from time to time of such area?

2. Is the Dominion of Canada under obligation to account to the Province of Saskatchewan for any lands within its boundaries alienated by the Dominion of Canada prior to September 1, 1905?”

The Supreme Court answered all the questions in favour of the Dominion, and the Province of Saskatchewan and the Province of Alberta (which is equally concerned with the decision) appeal.

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To appreciate the practical relevance of the questions it is necessary to go back to Canadian constitutional history at the time of the creation of the Dominion. The original provinces federally united by the British North America Act were Canada, Nova Scotia and New Brunswick. Lying to the west and north of the new Dominion were the vast tracts of country known as Rupert's Land and the North-Western Territory. Over this territory the Hudson's Bay Company exercised control more or less defined. Their charter, granted in 22 Charles II., had granted them large powers and a vast extent of land which was not well defined, but which was assumed to cover the whole of what was later known as Rupert's Land. They had extended their jurisdiction into the North-Western Territory, and were in practice the sole authority responsible for the maintenance of law and order in both districts. The existence of a trading company with vast obligations and necessarily limited resources had been recognized before 1867 by Canadian statesmen as an obstacle to the development of Canada, and communications had later taken place between the Government of the then Province of Canada, the British Government and the Company as to the surrender of the Company's charter rights. By s. 146 of the British North America Act provision was made for power to admit (*inter alia*) Rupert's Land and the North-Western Territory into the Union. Eventually, on November 19, 1869, in pursuance of an Imperial Act, 31 & 32 Vict. c. 105, the Hudson's Bay Company surrendered to the Crown all their rights granted by charter and all their lands within Rupert's Land. A Dominion Act was passed in the same year providing for the government of the territories after admission to the Union. On June 23, 1870, an Order in Council was made admitting Rupert's Land and the North-Western Territory into the Dominion. In 1870, in anticipation of the Order in Council, the Manitoba Act was passed, creating Manitoba a separate Province, carving its territory out of the new district so to be admitted. Thereafter, under appropriate legislation, Imperial and Dominion, the Dominion of Canada governed the rest of Rupert's Land and the North-Western Territory as part of the Dominion, dealing with the land in pursuance of the Dominion Lands Act of 1872. In 1905 it created out of the district two new Provinces, Saskatchewan and Alberta. Both the Saskatchewan and the Alberta Acts contained

provisions by which all Crown lands should continue to be vested in the Crown and administered by the Dominion for the purposes of Canada. In lieu of the land revenue each Province received an annual payment from the Dominion, varying with the population. It would appear that both the new Provinces found these provisions irksome, and objected to being put in a different position from the original Provinces as to land revenue, which under s. 109 of the British North America Act belonged to the Province. Questions were raised as to the validity of the legislation, and eventually in 1930 the Dominion entered into agreements with both Provinces whereby the interest of the Dominion in the public lands in each Province was transferred to the Province. The agreements were made on the express footing that the Provinces should be placed in a position of equality with the other provinces as to their "natural resources" (which would include the land) as from their entry into confederation in 1905.

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In this respect the agreement with Saskatchewan appears to put the Saskatchewan claim higher than that of Alberta; but as by the Acts adopting the agreements Alberta is to have no less rights against the Dominion than Saskatchewan, it is unnecessary to go beyond the agreement with the latter. The agreement is made March 20, 1930. The recitals are as follows: "Whereas by s. 22 of the Saskatchewan Act, being chapter 42 of the 4 & 5 Edw. 7, it was provided that 'All Crown lands, mines and minerals and royalties incident thereto, and the interest of the Crown in the waters within the Province under the North-Western Irrigation Act, 1898, shall continue to be vested in the Crown and administered by the Government of Canada for the purposes of Canada, subject to the provisions of any Act of the Parliament of Canada with respect to road allowances and roads or trails in force immediately before the coming into force of this Act, which shall apply to the said Province with the substitution therein of the said Province for the North-West Territories': And whereas the Government of Canada desires that the Province should be placed in a position of equality with the other provinces of Confederation with respect to the administration and control of its natural resources as from its entry into Confederation in 1905: And whereas the Government of the Province contends that, before the Province was constituted and entered into

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Confederation as aforesaid, the Parliament of Canada was not competent to enact that the natural resources within the area now included within the boundaries of the Province should vest in the Crown and be administered by the Government of Canada for the purposes of Canada and was not entitled to administer the said natural resources otherwise than for the benefit of the residents within the said area, and moreover that the Province is entitled to be and should be placed in a position of equality with the other Provinces of Confederation with respect to its natural resources as from July 15, 1870, when Rupert's Land and the North-Western Territory were admitted into and became part of the Dominion of Canada: And whereas it has been agreed between Canada and the said Province that the said section of the Saskatchewan Act should be modified and that provision should be made for the determination of the respective rights and obligations of Canada and the Province as herein set out."

After providing for the transfer of the land from the Dominion to the Province and setting out other terms, the agreement contains two clauses which give rise to this reference—namely:—

"23. Provision will be made pursuant to s. 55 of the Supreme Court Act, being chapter 35 of the Revised Statutes of Canada, 1927, to submit for the consideration of the Supreme Court of Canada questions agreed upon between the parties hereto as being appropriate to obtain the judgment of the said Court, subject to appeal to His Majesty in Council in accordance with the usual practice, as to the rights of Canada and the Province respectively, before September 1, 1905, in or to the lands, mines or minerals (precious or base), now lying within the boundaries of the Province, and as to any alienation by Canada before the said date of any of the said lands, mines or minerals or royalties incident thereto.

24. As soon as the final answers to the questions submitted under the last preceding paragraph have been given, the Government of Canada will appoint three persons to be agreed upon to be Commissioners under Part I. of the Inquiries Act, to inquire and report whether any and, if any, what consideration, in addition to the sums provided in paragraph 21 hereof, shall be paid to the Province in order that the Province may be placed in a position of equality

with the other provinces of Confederation with respect to the administration and control of its natural resources either as from September 1, 1905, or as from such earlier date, if any, as may appear to be proper, having regard to the answers to the questions submitted as aforesaid; such commissioners to be empowered to decide what financial or other considerations are relevant to the inquiry and the report to be submitted to the Parliament of Canada and to the Legislature of Saskatchewan; if by the said report, the payment of any additional consideration is recommended, then, upon agreement between the Governments of Canada and of the Province following the submission of such report, the said Governments will respectively introduce the legislation necessary to give effect to such agreement."

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It will be seen that it is only in order that Saskatchewan may support a claim under clause 24 of the agreement to be placed in a position of equality with other provinces with respect to the administration of its natural resources as from an earlier date than September, 1905 (the date of its creation as a province), that the questions arise at all. The position after 1905 is admittedly to be adjusted. Their Lordships feel bound to remark that it is difficult to see how Saskatchewan passes over the threshold of this claim. It had no separate existence at all before 1905, except as part of the North-Western Territories. Its predecessor, if a unit newly created and defined can have a predecessor, was the Dominion or, on the extreme view, the North-Western Territories, which also included the present Province of Alberta and other territory as well. It would appear to be difficult to correlate such a position to that of the other provinces of the Union, or to speak of "its" natural resources before it took any shape. However, the questions have been formulated and should be answered.

The argument of the Attorney-General for the Province may be summarized as follows. There was a well-established Imperial policy as to colonies that they should enjoy, for the benefit of the inhabitants, the revenues of lands in the colony vested in the Crown. This did not depend upon the colony being self-governing. This area was a colony before 1867, and though as to a large part of it the land was vested in the Hudson's Bay Company, yet on the surrender by that Company of its charter the colony

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was restored to its appropriate position of enjoying proprietary rights in the land. It therefore was in the same position as the original colonies, whose rights to the land were maintained as a fundamental principle of the British North America Act. On the true construction of the Order in Council and the legislation giving effect to the admission of the area into the Confederacy, the Dominion Government and Dominion Legislature were intended to administer the land revenues for the beneficial use of the inhabitants only of the area in question. Upon the establishment of the Province it must be taken to have attained its majority, and was entitled to go back to 1870 and have an account of the use of its resources during that time.

For the purposes of this case it is not necessary to discuss the accuracy of the earlier propositions in this argument. It may well be doubted whether there has ever been an invariable rule that a colony enjoyed its own land revenue. It would appear to be a question of fact in each case whether the Crown had placed its beneficial interest in land at the disposal of the particular colony. In the present case it is known that the Crown had parted with all its interest in the land to the Hudson's Bay Company so far as Rupert's Land is concerned. As to the North-Western Territory, it is at least doubtful whether before 1867 the beneficial interest in the land had been entrusted by the Crown to any authority, or whether there was in respect of that part of the area any colony at all within the meaning of the Attorney-General's argument. But, even assuming that the propositions in question were established, their Lordships have no doubt whatever that the effect of the surrender of the charter rights and the relevant legislation was on the admission of the area in question into the Dominion to give the Dominion full control of the land to be administered for the purposes of the Dominion as a whole, and not merely for the inhabitants of the area.

It is only necessary to read the addresses of the Dominion Parliament dealing with the admission of the new areas to be satisfied that the control of the whole area by the Dominion was treated as an important factor in Canadian policy, and was advocated in the words of the first address "to promote the prosperity of the Canadian people and conduce to the advantage of the whole Empire." It is not

merely improbable, but it is incredible, that at that stage of the development of Canada the resources of the immense area added to the Dominion were to be administered solely for the advantage of the sparse population scattered over its thousands of square miles. Even contemporaneously, when Manitoba was created a Province it was not given control of its lands: and it would certainly be remarkable if after 1870 the Dominion administered Manitoba's land for the purposes of the Dominion, but administered the larger areas of Rupert's Land and North-Western Territory for the purposes only of their few inhabitants. The provisions of the Order in Council and of s. 5 of the Imperial Act of 1868, Rupert's Land Act, make it clear that the Dominion was to govern the new area when admitted as part of the Dominion for the purposes of the Dominion.

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An argument was based on the terms of s. 146 of the British North America Act, which provides the power to admit Rupert's Land, etc., into the Union "on such terms and conditions in each case as are in the addresses expressed and as the Queen thinks fit to approve, subject to the provision of this Act." It was said that the reference to the provisions of this Act incorporated the proviso made in s. 109 that all the lands belonging to the several provinces of Canada, Nova Scotia and New Brunswick should continue to belong to the provinces, and that no powers could be given to the Dominion inconsistent with this. The answer is that s. 109 dealt only with the provinces thus admitted, and the provisions of the Act referred to in s. 146 are plainly the general provisions covering the structure of the Union into which new provinces were to be admitted, as, for instance, the section distributing legislative and other functions between the Dominions and the constituent provinces.

It is to be noted that the argument for the Province necessarily disputed the validity not only of s. 21 of the Alberta and Saskatchewan Acts of 1905, but also of the Dominion Lands Act of 1872. As to the Act of 1905, the validity of s. 21 appears to their Lordships to have been specifically upheld in the judgment of this Board in

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Attorney-General for Alberta v. Attorney-General for Canada (1), where it was decided that lands in Alberta granted by the Crown before or after September, 1905, in the absence of heirs, escheat to the Crown in right of the Dominion. There was adduced before their Lordships no ground for attacking the Dominion Lands Act of 1872 other than the general considerations mentioned above, which, as stated, have not the effect claimed. It follows that the answers to the respective sub-heads of question 1 must be in favour of the Dominion.

Their Lordships entirely agree with the reasoning of the judgment of Newcombe J. in the Supreme Court. It does not seem necessary to determine the slight difference of opinion between the Chief Justice and the other members of the Court as to the exact answer to question 1 (*d*). Treating the question, as the Chief Justice seems to have done, as meaning "to be administered exclusively for the benefit of the inhabitants from time to time of the area," the answer admits of a simple negative; but the qualified answer given by the majority of the Court cannot in any way be said to be wrong. The second question seems to be intended to ask as to the existence of a legal obligation to account to the Province of Saskatchewan for something done before the Province came into existence, without any statutory provision for the Province inheriting, or in some way having transferred to it, the rights, whatever they were, which before 1905 were invaded. As no rights were invaded, it is obvious that the question is correctly answered, No; and it becomes unnecessary to consider how, on a different hypothesis, an obligation to account could have been enforced by the Province.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed, and in accordance with the usual practice in such cases without costs.

Solicitors for appellants: *Blake & Redden.*

Solicitors for respondents: *Charles Russell & Co.*

[PRIVY COUNCIL.]

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ON APPEAL FROM THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC. 1932 A.C.
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Canada—Legislative power—Insurance business in province—Aliens—Immigration—Taxation—Provincial matter disguised as Dominion matter—Insurance Act (R.S. Can., 1927, c. 101), ss. 11, 12—Special War Revenue Act (R.S. Can., 1927, c. 179), s. 16—British North America Act, 1867 (30 & 31 Vict. c. 3), ss. 91, 92, 95.

A foreign or British insurer licensed under the Quebec Insurance Act to carry on business within the Province can do so without being also licensed under the Insurance Act of Canada. Sects. 11 and 12 of that Act requiring them to be licensed thereunder are ultra vires under the British North America Act, 1867, since, in the guise of legislation as to aliens and immigration, matters within the Dominion authority, they seek to intermeddle with the conduct of insurance business, which was declared in *Att-Gen. for Canada v. Att-Gen. for Alberta* [1916] 1 A.C. 588 to be a subject exclusively within Provincial authority.

Sect. 16 of the Special War Revenue Act of Canada is also ultra vires. In the guise of legislation imposing Dominion taxation, it in reality deals with the Provincial subject above mentioned.

Att-Gen. for Ontario v. Reciprocal Insurers [1924] A.C. 328 followed.

Judgment of the Court of King's Bench for Quebec varied.

APPEAL and CROSS-APPEAL (No. 36 of 1931) from a judgment of the Court of King's Bench (Appeal Side) for the Province of Quebec, delivered on June 28, 1930, in answer to questions referred to that Court by the Lieutenant-Governor in Council under R.S. Queb., 1925, c. 7.

The questions referred were:—

1. Is a foreign or British insurer who holds a license under the Quebec Insurance Act to carry on business within the Province obliged to observe and subject to ss. 11, 12, 65 and 66 of the Insurance Act of Canada, or are these sections unconstitutional as regards such insurer?

2. Are ss. 16, 20 and 21 of the Special War Revenue Act within the legislative competence of the Parliament of Canada? Would there be any difference between the case of an insurer who has obtained or is bound to obtain under the Provincial law a license to carry on business in the Province and any other case?

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**Present*:—VISCOUNT DUNEDIN, LORD BLANESBURGH, LORD ATKIN, LORD RUSSELL OF KILLOWEN, and LORD MACMILLAN.

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The terms of ss. 11 and 12 of the Insurance Act of Canada (R.S. Can., 1927, c. 101) and of s. 16 of the Special War Revenue Act (R.S. Can., 1927, c. 179) appear from the judgment here reported. Sects. 65 and 66 of the former Act imposed penalties for contraventions of ss. 11 and 12; s. 20 of the latter Act requires every person to whom s. 16 applies to make an annual return of the names of the companies, etc., with which he has effected insurances, and s. 21 imposes penalties for contraventions of s. 20.

The answers made by the Court of King's Bench were as follows: To question 1 (by a majority)—in the case of a foreign insurer, "yes" to the first part, "no" to the second part; in the case of a British insurer, "no" to the first part and "yes" to the second part. To question 2 (unanimously)—"yes" to the first part, and "no" to the second part. The proceedings are reported at Q.R. 49 K.B. 236.

1931. July 20, 21. *Lancot K.C.*, *Geoffrion K.C.* and *Maurice Alexander* for the Attorney-General for Quebec, appellant in the first appeal.

St. Laurent K.C. and *Plaxton K.C.* for the Attorney-General for Canada, respondent in the first appeal.

Tilley K.C., *E. Bayly K.C.* and *Leighton Foster* for the Attorney-General for Ontario, intervener.

Lancot K.C. and *Maurice Alexander* for the Attorney-General for British Columbia, intervener.

V. Evan Gray for intervening companies.

In addition to cases referred to in the judgment of their Lordships, reference was made to *Cunningham v. Tomey Homma* (1); *Brooks-Bidlake and Whittall, Ltd. v. Att.-Gen. for British Columbia* (2); and *Att.-Gen. for Manitoba v. Att.-Gen. for Canada*. (3)

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Oct. 22. The judgment of their Lordships was delivered by

VISCOUNT DUNEDIN. Under one of the provisions of the statutes of Quebec the Lieutenant-Governor in Council may refer to the Court of the King's Bench for hearing and

(1) [1903] A.C. 151.

(2) [1923] A.C. 450.

(3) [1929] A.C. 260.

consideration any question he deems expedient. Acting under that provision and upon the narrative that several foreign or British insurers had obtained licenses under the Quebec Insurance Act and that the Department of Insurance of the Dominion was endeavouring to force these companies to obtain a license under ss. 11 and 12 of the Insurance Act of Canada, R.S. Can., 1927, c. 101, and to recover from persons who insure with these insurers the tax imposed by ss. 16, 20 and 21 of the Special War Revenue Act, R.S. Can., 1927, c. 179, the Lieutenant-Governor in Council referred to the Court of King's Bench the following questions:—

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1. Is a foreign or British insurer who holds a license under the Quebec Insurance Act to carry on business within the Province obliged to observe and subject to ss. 11, 12, 65 and 66 of the Insurance Act of Canada, or are these sections unconstitutional as regards such insurer?

2. Are ss. 16, 20 and 21 of the Special War Revenue Act within the legislative competence of the Parliament of Canada? Would there be any difference between the case of an insurer who has obtained or is bound to obtain under the Provincial law a license to carry on business in the Province and any other case?

Sects. 11 and 12 of the Insurance Act of Canada are as follows:—

“11. It shall not be lawful for (a) any Canadian company; or (b) any alien, whether a natural person or a foreign company, within Canada to solicit or accept any risk, or to issue or deliver any receipt or policy of insurance, or to grant, in consideration of any premium or payment, any annuity on a life or lives, or to collect or receive any premium, or, except as provided in section one hundred and twenty-nine of this Act, to inspect any risk or adjust any loss, or to advertise for or carry on any business of insurance, or to prosecute or maintain any suit, action or proceeding, or to file any claim in insolvency relating to such business, unless under a license from the Minister granted pursuant to the provisions of this Act.

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“12. It shall not be lawful for any British company, or for any British subject not resident in Canada, to immigrate into Canada for the purpose of opening or establishing any office or agency for the transaction of any business of or relating to

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insurance, or of soliciting or accepting any risk or issuing or delivering any interim receipt or policy of insurance, or granting, in consideration of any premium or payment, any annuity on a life or lives, or of collecting or receiving any premium, or, except as provided in section one hundred and twenty-nine of this Act, of inspecting any risk or adjusting any loss, or of carrying on any business of or relating to insurance, or of prosecuting or maintaining any suit, action or proceeding or filing any claim in insolvency relating to such business, unless under a license from the Minister granted pursuant to the provisions of this Act."

Sects. 65 and 66 need not be quoted as they only prescribe penalties for contravention.

The case was heard before five judges. There was some difference of opinion between them as to the answer to the first question, but the judgment of the majority gave answer as follows: In the case of a foreign insurer, "yes" to the first part, "no" to the second. In the case of a British insurer, "no" to the first part and "yes" to the second. As to the second question they were unanimous, and the answer was "yes" to the first part and "no" to the second.

In the presentation of the case appearance has been entered by the Attorneys-General for Quebec, Ontario and British Columbia, also by certain companies which insured their property against fire and other risks with various insurance companies and underwriters of Canadian, British and foreign origin carrying on insurance business in Canada. These parties all contended that the sections cited were unconstitutional and ultra vires. The Attorney-General for Canada, who also appeared, contended that they were constitutional and intra vires. Success being divided the Attorney-General for Quebec appealed and the Attorney-General for Canada cross-appealed to His Majesty in Council. This case is, it may be hoped, the last of the series of litigations between the Dominion and the Provinces with regard to insurance.

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It is not in their Lordships' opinion necessary for them, as it was for the judges in the Courts below, to examine in detail the various cases that have arisen in the Canadian courts. They think that the questions raised can be conclusively dealt with in the light of four cases which

have reached this Board. These are in chronological order: *Citizens Insurance Co. v. Parsons* (1); *John Deere Plow Co. v. Wharton* (2); *Attorney-General for Canada v. Attorney-General for Alberta* (3); and *Attorney-General for Ontario v. Reciprocal Insurers*. (4)

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The case of the *Citizens Insurance Co. v. Parsons* (1) was not fought directly between the Dominion and the Provinces, either as parties or interveners. It was an action by a private individual to recover money under an insurance contract for a loss by fire. The defence was non-compliance on the part of the insured with certain statutory conditions imposed by a Provincial Ontario Act and applicable to insurers, to which the answer was made that the provisions were ultra vires as trespassing on the province of Dominion legislation. It was held that the conditions were not ultra vires, and the defence was good. The arguments turned on what may be called the competing claims of ss. 91 and 92 of the British North America Act. The principle laid down was clear. It is within the power of the Dominion legislature to create the person of a company and endow it with powers to carry on a certain class of business, to wit, insurance; and nothing that the Provinces can do by legislation can interfere with the status so created; but none the less the Provinces can by legislation prescribe the way in which insurance business or any other business shall be carried on in the Provinces. The great point of the case is the clear distinction drawn between the question of the status of a company and the way in which the business of the company shall be carried on. This distinction was clearly acted on in the next case, which was not an insurance case.

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John Deere Plow Co.'s case (2) related to a company incorporated under Dominion legislation to carry on the business of trading in agricultural implements throughout Canada. The Parliament of British Columbia sought means to restrain any such trade by enacting that the trader should have no power to sue unless he had obtained a license to trade from the Provincial authorities. It was held that this was ultra vires of the Province, as being an attempt to interfere with the status of the company.

(1) (1881) 7 App. Cas. 96.
(2) [1915] A.C. 330.

(3) [1916] 1 A.C. 588.
(4) [1924] A.C. 328.

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Then came the case of *Attorney-General for Canada v. Attorney-General for Alberta*. (1) This was the first direct trial of strength between a Province and the Dominion. By s. 4 of the Dominion Insurance Act of 1910 it was provided that no company or person should do insurance business unless they had received a Dominion license so to act. This provision was fortified by a penalty for contravention under s. 70. Two questions were put to the Court: (1.) Are ss. 4 and 70 of the Act or any part thereof ultra vires of the Parliament of Canada? (2.) Does s. 4 operate to prohibit a foreign company carrying on business without a license even though its business is confined to one Province?

The Board answered the first question in the affirmative. Here again the arguments turned on the competing claims of ss. 91 and 92, and the decision on this question conclusively and finally settled that regulations as to the carrying on of insurance business were a Provincial and not a Dominion matter. It really only carried to their logical conclusion the two cases already cited.

As to the second question, Lord Haldane said (2): "The second question is, in substance, whether the Dominion Parliament has jurisdiction to require a foreign company to take out a licence from the Dominion Minister, even in a case where the company desires to carry on its business only within the limits of a single province. To this question their Lordships' reply is that in such a case it would be within the power of the Parliament of Canada, by properly framed legislation, to impose such a restriction. It appears to them that such a power is given by the heads in s. 91, which refer to the regulation of trade and commerce and to aliens. This question also is therefore answered in the affirmative."

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The first question in the present appeal really turns upon whether the sections impugned fall within the sentence of the Board just quoted.

But before discussing this it will be well to examine the remaining case mentioned—namely, the *Reciprocal Insurers'* case. (3) After the decision against them on the first question in the last case in 1916, the Dominion legislation on this subject was altered. A new Act was passed in

(1) [1916] 1 A.C. 588.

(2) [1916] 1 A.C. 588, 597.

(3) [1924] A.C. 328.

1917. In place of the old s. 4, which had been declared ultra vires by the decision, there were now enacted ss. 11 and 12 in these terms:—

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“It shall not be lawful for (a) any Canadian company; or (b) any alien, whether a natural person or a foreign company, within Canada to solicit or accept any risk, or to issue or deliver any receipt or policy of insurance, or to grant, in consideration of any premium or payment, any annuity on a life or lives, or to collect or receive any premium, or, except as provided in section one hundred and twenty-nine of this Act, to inspect any risk or adjust any loss, or to advertise for or carry on any business of insurance, or to prosecute or maintain any suit, action or proceeding, or to file any claim in insolvency relating to such business, unless under a license from the Minister granted pursuant to the provisions of this Act.” 1917, c. 29, s. 11.

“12. (1.) It shall not be lawful for any British company, or for any British subject not resident in Canada, to immigrate into Canada for the purpose of opening or establishing any office or agency for the transaction of any business of or relating to insurance, or of soliciting or accepting any risk or issuing or delivering any interim receipt, or any policy of insurance, or granting, in consideration of any premium or payment, any annuity on a life or lives, or of collecting or receiving any premium, or, except as provided in section one hundred and twenty-nine of this Act, of inspecting any risk or adjusting any loss, or of carrying on any business of or relating to insurance, or of prosecuting or maintaining any suit, action or proceeding, or of filing any claim in insolvency relating to such business, unless under a license from the Minister granted pursuant to the provisions of this Act.

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“(2.) A company shall be deemed to immigrate into Canada within the meaning of this section if it sends into Canada any document appointing or otherwise appoints any person in Canada its agent for any of the purposes mentioned in subsection one of this section.”

Contravention of these provisions was dealt with by sections imposing penalties. But besides that, there had been inserted in the Criminal Code two new sections, 508c and 508d, which constituted as a criminal offence the doing of insurance business without a Dominion license. Mean-

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time Ontario had passed an Act dealing with mutual insurance. This led to the case in which the questions proposed were as follows: (1.) Is it within the legislative competence of the legislature of the Province of Ontario to regulate or license the making of reciprocal contracts by such legislation as that embodied in the Reciprocal Insurance Act, 1922? (2.) Would the making or carrying out of reciprocal insurance contracts licensed pursuant to the Reciprocal Insurance Act, 1922, be rendered illegal or otherwise affected by the provisions of ss. 508c and 508d of the Criminal Code as enacted by c. 26 of the Statutes of Canada 7 and 8 Geo. 5 in the absence of a license from the Minister of Finance issued pursuant to s. 4 of the Insurance Act of Canada, 7 & 8 Geo. 5, c. 29? (3.) Would the answers to questions 1 or 2 be affected, and if so, how, if one or more of the persons subscribing to such Reciprocal Insurance contracts is: (a) a British subject not resident in Canada immigrating into Canada? (b) an alien?

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Mr. Justice Duff, who delivered the judgment of the Board, expressed himself thus (1): "The provisions relating to licenses in the Insurance Act of 1910, which" [by the judgment of 1916] "was declared to be ultra vires, and the regulations governing licenses under the Act and applicable to contracts and to the business of insurance, did not, in any respect presently material, substantially differ from those now found in the legislation of 1917; but the provisions of the statute of 1910 derived their coercive force from penalties created by the Insurance Act itself. The distinction between the legislation of 1910 and that of 1917, upon which the major contention of the Dominion is founded, consists in the fact that s. 508c is enacted in the form of an amendment to the statutory criminal law, and purports only to create offences which are declared to be indictable, and to ordain penalties for such offences. The question now to be decided is whether, in the frame in which this legislation of 1917 is cast, that part of it which is so enacted can receive effect as a lawful exercise of the legislative authority of the Parliament of Canada in relation to the criminal law. It has been formally laid down in judgments of this Board, that in such an inquiry the Courts must ascertain 'the true

nature and character' of the enactment: *Citizens Insurance Co. v. Parsons* (1); its 'pith and substance': *Union Colliery Co. v. Bryden* (2). . . . "

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The Board proceeded to decide that the amendment of the criminal law by s. 508c was not a genuine amendment of the criminal law, but was really an attempt by a so-called amendment of the criminal law to subject insurance business in the Province to the control of the Dominion, that which had exactly been determined to be ultra vires by the judgment of 1916. This decided the main question.

As regards question 3, it was answered in the negative, but there was added the following addendum: "Their Lordships do not express any opinion as to the competence of the Dominion Parliament, by virtue of its authority in relation to aliens and to trade and commerce, to enact ss. 11 and 12, sub-s. 1, of the Insurance Act. This, although referred to on the argument before their Lordships' Board, was not fully discussed, and since it is not directly raised by the question submitted, their Lordships, as they then intimated, considered it inadvisable to express any opinion upon it. Their Lordships think it sufficient to recall the observation of Lord Haldane, in delivering the judgment of the Board, in *Attorney-General for Canada v. Attorney-General for Alberta* (3), to the effect that legislation, if properly framed, requiring aliens, whether natural persons or foreign companies, to become licensed, as a condition of carrying on the business of insurance in Canada, might be competently enacted by Parliament."

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Following on this judgment, the Dominion Parliament, by an amending statute in 1924, repealed sub-s. 2 of s. 12 of the Act of 1917. The Act of 1927, which is the Act with which the present case has to do, reproduces, as has been seen, ss. 11 and 12 and the corresponding penal sections renumbered as 66 and 67, and in the Criminal Code of 1927 the old 508c reappears as 507, but with an exception as to reciprocal insurance companies so as to avoid the direct result of the judgment of 1924.

Their Lordships are now in a position to address themselves directly to the first question in this case. It is clear

(1) 7 App. Cas. 96.

(2) [1899] A.C. 580.

(3) [1916] 1 A.C. 588.

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from the quotations from the *Reciprocal Insurers'* case (1) that the question is technically still open, and it is clear from the judgment in the 1916 case that the sections in question can only be justified if to them can be applied what was there said by Lord Haldane in his answer to query 2. Their Lordships will repeat it: "To this question their Lordships' reply is that in such a case it would be within the power of the Parliament of Canada, by properly framed legislation, to impose such a restriction. It appears to them that such a power is given by the heads in s. 91, which refer to the regulation of trade and commerce and to aliens."

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The state of opinion in the Court below was as follows: Two learned judges thought that the sections were ultra vires, whether applied to British or to foreign insurers; but three judges, while holding the sections ultra vires as to British subjects, held that they were intra vires as to aliens. Now so far as British subjects were concerned the view was that Lord Haldane's dictum showed clearly that the only power of restriction given rested upon its being possible to connect it with alien legislation, and that therefore it was impossible to bring British subjects within the scope of the dictum. So far as this argument goes, their Lordships think it is sound, but at the same time they think it unnecessary, because they think it is swallowed up in the wider consideration which makes the sections bad as regards both aliens and British subjects. Their Lordships consider that although the question was studiously kept open in the *Reciprocal Insurers'* case (1), it was really decided by what was then laid down. The case decided that a colourable use of the Criminal Code could not serve to disguise the real object of the legislation, which was to dominate the exercise of the business of insurance. And in the same way it was decided that to try by a false definition to pray in aid s. 95 of the British North America Act, 1867, which deals with immigration, in order to control the business of insurance, was equally unavailing. What has got to be considered is whether this is in a true sense of the word alien legislation, and that is what Lord Haldane meant by "properly framed legislation." Their Lordships have no doubt that the Dominion Parliament might pass an Act forbidding aliens to enter Canada

or forbidding them so to enter to engage in any business without a license, and further they might furnish rules for their conduct while in Canada, requiring them, e.g., to report at stated intervals. But the sections here are not of that sort, they do not deal with the position of an alien as such; but under the guise of legislation as to aliens they seek to intermeddle with the conduct of insurance business, a business which by the first branch of the 1916 case has been declared to be exclusively subject to Provincial law. Their Lordships have, therefore, no hesitation in declaring that this is not "properly framed" alien legislation.

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As regards British subjects, who cannot be styled aliens, once the false definition is gone, the same remark applies as to alien immigrants. This is not properly framed law as to immigration, but an attempt to saddle British immigrants with a different code as to the conduct of insurance business from the code which has been settled to be the only valid code, i.e., the Provincial Code.

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Passing now to the second question, it seems to their Lordships that precisely the same line of reasoning applies. The only section that need be quoted is s. 16, the other sections being only concomitants thereto; that section is as follows: "(16.) Every person resident in Canada, who insures his property situate in Canada, or any property situate in Canada in which he has an insurable interest, other than that of an insurer of such property, against risks other than marine risks: (a) with any British or foreign company or British or foreign underwriter or underwriters, not licensed under the provisions of the Insurance Act, to transact business in Canada; or (b) with any association of persons formed for the purpose of exchanging reciprocal contracts of indemnity upon the plan known as inter-insurance and not licensed under the provisions of the Insurance Act, the chief place of business of which association or of its principal attorney-in-fact is situate outside of Canada; shall on or before the thirty-first day of December in each year pay to the Minister, in addition to any other tax payable under any existing law or statute a tax of five per centum of the total net cost to such person of all such insurance for the preceding calendar year."

Now as to the power of the Dominion Parliament to impose taxation there is no doubt. But if the tax as imposed is linked up with an object which is illegal the tax

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for that purpose must fall. Sect. 16 clearly assumes that a Dominion license to prosecute insurance business is a valid license all over Canada and carries with it the right to transact insurance business. But it has been already decided that this is not so; that a Dominion license, so far as authorizing transactions of insurance business in a Province is concerned, is an idle piece of paper conferring no rights which the party transacting in accordance with Provincial legislation has not already got, if he has complied with Provincial requirements. It is really the same old attempt in another way.

Their Lordships cannot do better than quote and then paraphrase a portion of the words of Duff J. in the *Reciprocal Insurers'* case. (1) He says: "In accordance with the principle inherent in these decisions their Lordships think it is no longer open to dispute that the Parliament of Canada cannot, by purporting to create penal sanctions under s. 91, head 27, appropriate to itself exclusively a field of jurisdiction in which, apart from such a procedure, it could exert no legal authority, and that if, when examined as a whole, legislation in form criminal is found, in aspects and for purposes exclusively within the Provincial sphere, to deal with matters committed to the Provinces, it cannot be upheld as valid." If instead of the words "create penal sanctions under s. 91, head 27" you substitute the words "exercise taxation powers under s. 91, head 3," and for the word "criminal" substitute "taxing", the sentence expresses precisely their Lordships' views.

Their Lordships will, therefore, humbly advise His Majesty to declare that the proper answers to the questions put are: to the first part of question 1, "No"; and to the second part, "Yes"; to the second question in both branches, "No"—and that the appeal and cross-appeal should be dealt with in accordance with the said declaration.

Solicitors for Attorneys-General for Provinces: *Blake & Redden.*

Solicitors for Attorney-General for Canada: *Charles Russell & Co.*

Solicitors for intervening companies: *Lawrence Jones & Co.*

[PRIVY COUNCIL.]

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ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Legislative power—Aerial navigation—International Convention—Dominion power as to treaty obligations—Residual legislative power—Matter of national interest and importance—Reference of abstract Questions—Aeronautics Act (R.S. Can., 1927, c. 3), s. 4—Air Regulations, 1920—British North America Act, 1867 (30 & 31 Vict. c. 3), ss. 91, 92, 132.

The whole field of legislation in relation to aerial navigation in Canada belongs to the Dominion.

Having regard to (a) s. 132 of the British North America Act, 1867, which gives to the Parliament and Government of Canada all powers necessary or proper for performing the obligations of Canada, or of any Province thereof, under treaties between the British Empire and foreign countries, (b) the fact that an international Convention of 1919, a treaty under s. 132, covered almost every conceivable matter relating to aerial navigation, and (c) the further powers of the Parliament of Canada under s. 91, heads 2 (trade and commerce), 5 (postal services) and 7 (military and naval services), substantially the whole field of legislation in regard to the subject belongs to the Dominion. Any small portion not vested in the Dominion by specific words in the Act of 1867 is not so vested in the Provinces, and necessarily belongs to the Parliament of Canada under its authority to make laws for the peace, order and good government of Canada. Further, the subject of aerial navigation, and the fulfilment of Canadian obligations under s. 132, are matters of national interest and importance; aerial navigation is a class of subject which has attained such dimensions as to affect the body politic of the Dominion.

Consequently, the Dominion powers under s. 132 in relation to the obligations under the Convention were exclusive powers, and the Parliament of Canada had authority to enact the Aeronautics Act (R.S. Can., 1927, c. 3), s. 4, and the Air Regulations, 1920, respecting the licensing of pilots, navigators, etc., and the regulation and licensing of all aircraft, aerodromes and air stations.

Observations as to the difficulties which may arise from the reference to the Supreme Court of abstract questions, and the duty of the Judicial Committee in the matter: *Att.-Gen. for British Columbia v. Att.-Gen. for Canada* [1914] A.C. 153, 162 referred to thereon.

Judgment of the Supreme Court of Canada [1930] S.C.R. 663 reversed.

APPEAL (No. 38 of 1931) by special leave from a judgment of the Supreme Court of Canada, dated October 7, 1930, in answer to questions referred to that Court by the Governor General in Council under s. 55 of the Supreme Court Act.

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The questions referred, and the answers returned by the Supreme Court, were as follows:—

**Present:—*LORD SANKEY L.C., VISCOUNT DUNEDIN, LORD ATKIN, LORD RUSSELL OF KILLOWEN, and LORD MACMILLAN.

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(1.) Have the Parliament and Government of Canada exclusive legislative and executive authority for performing the obligations of Canada, or of any Province thereof, under the Convention entitled "Convention relating to the Regulation of Aerial Navigation?"

Answer: To question 1 as framed, the Court unanimously answers "No."

(2.) Is legislation of the Parliament of Canada providing for the regulation and control of aeronautics generally within Canada, including flying operations carried on entirely within the limits of a Province, necessary or proper for performing the obligations of Canada, or of any Province thereof, under the Convention aforementioned, within the meaning of s. 132 of the British North America Act, 1867?

Answer: The answer of the majority of the Court (Anglin C.J., Duff, Rinfret, Lamont, Smith and Cannon JJ.) is: "Construing the word 'generally' in the question as equivalent to 'in every respect' the answer is 'No.'"

(3.) Has the Parliament of Canada legislative authority to enact, in whole or in part, the provisions of s. 4 of the Aeronautics Act, c. 3, R.S. Can., 1927?

Answer: The answer of the majority of the Court (Anglin C.J., Duff, Newcombe, Rinfret, Lamont and Cannon JJ.) is: "Construing the question as meaning, 'Is the section mentioned, as it stands, validly enacted?' the answer is 'No.'"

But, if the question requires the Court to consider the matters in the enumerated sub-heads of s. 4 of the statute as severable fields of legislative jurisdiction, then the answers are to be ascertained from the individual opinions or reasons certified by the Judges.

(4.) Has the Parliament of Canada legislative authority to sanction the making and enforcement, in whole or in part, of the regulations contained in the Air Regulations, 1920, respecting: (a) The granting of certificates or licences authorizing persons to act as pilots, navigators, engineers or inspectors of aircraft and the suspension or revocation of such licences; (b) The regulation, identification, inspection, certification and licensing of all aircraft; and (c) The licensing, inspection and regulation of all aerodromes and air stations?

Answer: The answers are to be ascertained from the individual opinions or reasons certified by the judges.

The reasons of the learned judges appear from a report at [1930] S.C.R. 663.

The Convention referred to in question 1 was drawn up in Paris at the Peace Conference, and dated October 13, 1919; it was subsequently signed by representatives of the Allied and Associated Powers, including Canada, and was ratified by His Majesty on behalf of the British Empire on June 1, 1922. It consisted of forty-three articles and sixteen annexes of an elaborate character.

The nature of the matters dealt with in the Convention, also the provisions of the Dominion legislation and of the Regulations made thereunder, now represented by s. 4 of the Aeronautics Act (R.S. Can., 1927, c. 3) and the Air Regulations, 1920, appear from the present judgment.

By the British North America Act, 1867, s. 132: "The Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada, or of any Province thereof, as part of the British Empire, towards foreign countries arising under treaties between the Empire and such foreign countries." The material provisions of ss. 91 and 92, which contain a distribution of legislative powers between the Dominion and the Provinces, appear from the judgment.

The present appeal by the Attorney-General for Canada was confined to answers 1, 3 and 4; the reasons for not desiring to review answer 2 are stated in the judgment.

1931. July 10, 14, 16, 17, 20. *Tilley K.C.* and *Plaxton K.C.* (with them *A. T. Denning*) for the appellant, the Attorney-General for Canada. Aerial navigation in Canada is a subject entirely within the authority of the Parliament of Canada under the British North America Act, 1867, independently of s. 132 of that Act. It is not within any of the heads of s. 92, as they are confined to matters which are Provincial and local. That appears from their terms; moreover it has been held that the words "matters of a local and private nature" at the end of s. 91 are descriptive

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of all the heads of s. 91: *Att.-Gen. for Ontario v. Att.-Gen. for Canada*. (1) The subject is not of merely local and Provincial concern, but is, in the words of the judgment in that appeal, "of unquestionable Canadian interest and importance." It is a matter which could only be dealt with effectively as a single subject of legislation. The Convention shows that it affects the whole body politic of Canada. The whole subject therefore falls within the powers of the Parliament of Canada, under the initial words of s. 91, to make laws for the peace, order and good government of Canada in matters not assigned to the Provincial legislatures. Aerial navigation is a right of the public generally, not special to any Province, consequently its regulation and control, like that of the public right of fishing in tidal waters, is outside the authority of the Provincial legislatures and within that of the Dominion: *Att.-Gen. for British Columbia v. Att.-Gen. for Canada* (2); *Att.-Gen. for Canada v. Att.-Gen. for Quebec*. (3) The maxim "*cujus est solum ejus est usque ad cælum*" does not apply so as to prevent aerial navigation from being a public right; flying over land is not a trespass to any proprietary right: *Pickering v. Rudd* (4); *Clifton v. Bury* (5); *Foy v. Prentice*. (6) If it is necessary to refer the Dominion power to a specific head of s. 91, the subject as a whole was within head 2 (the regulation of trade and commerce), and head 10 (navigation and shipping). The words in which the enumerated powers are expressed should be construed so as to give effect to the scheme of the Act as a whole: *Att.-Gen. for Ontario v. Att.-Gen. for Canada* (7); Story's American Constitution, 4th ed., p. 310. The word "navigation" in head 10 should therefore not be restricted to navigation as understood in 1867. Although the application of s. 91, head 2, has been restricted by decisions, it has been recognized as authorizing legislation affecting Canada as a whole. For instance, as enabling the incorporation of companies with Dominion status and powers with which the Provincial legislatures cannot interfere: *John Deere Plow Co. v. Wharton*. (8) The power under s. 91, head 2, has recently been considered in the light of decisions of the Board by Duff J. in *Lawson*

(1) [1896] A.C. 348, 359, 360.

(2) [1914] A.C. 153.

(3) [1921] 1 A.C. 413.

(4) (1815) 4 Camp. 219.

(5) (1887) 4 Times L.R. 8.

(6) (1845) 1 C.B. 828.

(7) [1912] A.C. 571, 581.

(8) [1915] A.C. 330.

v. *Interior Tree, Fruit and Vegetable Committee of Direction* (1), a distinction being drawn between that which is national in its scope, as this matter is, and that which is of Provincial interest. The exercise of the power under s. 91, head 2, is not confined to matters as to which the Dominion has legislative powers otherwise: *Proprietary Articles Trade Association v. Att.-Gen. for Canada* (2); there are earlier dicta which appeared to state the contrary. As to particular regulations the appellant relies also upon s. 91, heads 5 (postal services), 7 (military and naval services), 9 (beacons), 27 (aliens). So far as any regulation was not directly within any specified head of s. 91, it was necessary to make regulations within those heads effective. If aerial navigation is to be regarded as a subject wholly outside the enumerated heads of both ss. 91 and 92, it is clearly within the power to make laws for the peace, order and good government of Canada; s. 91 declares that the generality of that power is not to be affected by the enumerations which follow.

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Apart, however, from ss. 91 and 92, the Parliament of Canada under s. 132 is the only legislature authorized to perform treaty obligations, whether of Canada or of the Provinces. The Convention deals with so many topics that those obligations cannot be performed effectively without some regulations not directly within its terms.

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Sir John Simon K.C. (with him *Lanctot K.C.*, *Geoffrion K.C.*, *Frank Gahan* and *Maurice Alexander*), for the respondent, the Attorney-General for Quebec. The legislative powers may first be considered apart from the Convention. The distribution in ss. 91 and 92 is intended to be complete though the heads may overlap. An important function of a legislature is to make laws as to transport, which subject includes aerial navigation, but transport is not dealt with save so far as "navigation and shipping" is assigned to the Dominion, and by s. 92, head 10, the subject, to a limited extent, is taken out of the Provincial power. The reason is that transport (including aerial navigation), in all its material incidents, is a matter within the exclusive powers of the Provinces under s. 92, head 13 (property and civil rights). Aeroplanes and aerodromes are property as certainly as motor cars and garages, and

(1) [1931] S.C.R. 357, 364.

(2) [1931] A.C. 310, 326.

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their use is a civil right in the Province where they may be. Aeroplanes may be, and are, used by Provincial authorities for such purely Provincial objects as the detection of forest fires, survey and police purposes. These are matters of a local nature within s. 92, head 16. The regulations themselves show the great extent to which the subject is within the exclusive powers of the Provinces. The matter is not within s. 91, head 10. The considerations as to flying over land differ materially from those as to the navigation of the sea and tidal waters by ships; the use of the words "navigation" and "ship" in connection with flying are merely metaphorical. Nor can the legislation be justified under s. 91, head 2, having regard to the extensive interference with matters within the exclusive powers of the Provinces under s. 92, heads 13 and 16: *In re Board of Commerce Act, 1919*. (1) The general power of the Parliament of Canada to make laws for the peace, order and good government of Canada is limited by s. 91 to matters not exclusively assigned to the Provinces. If the subject-matter is within a head of s. 92, legislation thereon is valid under the general power only if it can be brought within the specific heads under s. 91: *Att.-Gen. for Ontario v. Att.-Gen. for Canada* (2); *Att.-Gen. of Manitoba v. Manitoba Licence Holders' Association* (3); *John Deere Plow Co. v. Wharton*. (4) The matter does not fall within the limited principle upon which in *Russell v. The Queen* (5) (as explained in *Toronto Electric Commissioners v. Snider* (6) and *Fort Frances Pulp and Power Co. v. Manitoba Free Press Co.* (7)) Dominion legislation was held to be valid under the general power. Those judgments show that cases to which that principle applies are highly exceptional and arise only in the event of an emergency such as war; that view was stated also *In re Board of Commerce Act, 1919*. (8) Legislation is not competent under the general power merely because it is for the general advantage of Canada or meets a want felt throughout the Dominion: *Snider* case. (6) Inconvenience, owing to the absence of legislation, can be met by legislative co-operation between the Provinces: *City of Montreal v. Montreal Street Ry.* (9)

(1) [1922] 1 A.C. 191.

(2) [1896] A.C. 348, 360.

(3) [1902] A.C. 73, 79.

(4) [1915] A.C. 330, 337.

(5) (1882) 7 App. Cas. 829.

(6) [1925] A.C. 396, 412.

(7) [1923] A.C. 695.

(8) [1922] 1 A.C. 191, 197.

(9) [1912] A.C. 333.

The view in the Supreme Court as to question 1 was right. The word "exclusively" is not in s. 132, though it is in ss. 91, 92 and 93. Sect. 132 gives only such power as is necessary or proper for fulfilling the obligations referred to. If Provincial legislation adequately covers the matter there is nothing for the Dominion to do under s. 132; the section does not prevent the Provinces from legislating as to a Provincial matter, though it is a matter concerned with aerial navigation. The answer to question 3 is that s. 4 of the Aeronautics Act is wholly invalid. Having regard to the opening words, which purport to authorize the Minister to regulate and control aerial navigation over Canada as a whole, the provisions are not severable so as to make it possible to hold them valid in part and invalid in part: *Rex v. Faversham Fishermen's Company* (1); *Attwood v. Lamont* (2); *Att.-Gen. for Manitoba v. Att.-Gen. for Canada*. (3) With regard to question 4, each regulation should be considered as though it were a section in a Dominion statute. The regulations cannot be justified by the Convention as, subject to some amendments, they were enacted before the Convention was signed. In any case the obligations to be performed under s. 132 were only those relating to international flying. The section did not justify a vast body of regulations dealing with the whole subject. The power was not so exercised in relation to the Japanese treaty (3 & 4 Geo. 5, c. 27, Can.) referred to in *Att.-Gen. of British Columbia v. Att.-Gen. of Canada* (4); nor by 11 & 12 Geo. 5, c. 8 (Can.), in relation to the French trade agreement. The judgment of Duff J., concurred in by Rinfret and Lamont JJ., which dealt with the regulations in detail, is adopted.

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E. Bayly K.C. and *J. T. White K.C.* for the respondent the Attorney-General for Ontario, adopted the argument on behalf of the Attorney-General for Quebec.

Tilley K.C. in reply. The fact that the Aeronautics Act and the Air Regulations originated before the Convention was signed is not material having regard to the terms and purpose of the questions. Transport is an essential part of "trade and commerce." Sect. 92, head 13, applies only to that part of the subject which is local in a Province, as

(1) (1799) 8 T.R. 352.
(2) [1920] 3 K.B. 571.

(3) [1925] A.C. 561.
(4) [1924] A.C. 203.

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is shown by head 10; by head 10 (a) the Dominion is made the sole judge whether a work wholly within a Province is to be under the control of the Dominion as of general advantage. The Provincial power does not apply where inter-Provincial matters are involved: *Att.-Gen. for Ontario v. Att.-Gen. for Canada*. (1) Sect. 92, head 13, must be read in conjunction with the other heads; unless its effect is limited the Parliament of Canada could make few or no laws under its general power: *Russell v. The Queen*. (2) The subject of aerial navigation is of an order which passes beyond the heads of s. 92, and in relation to it the heads of s. 92 are to be regarded in a new and special aspect. *Toronto Electric Commissioners v. Snider* (3); *Fort Frances Pulp and Power Co. v. Manitoba Free Press Co.* (4) The rule to be applied is that laid down by the Board in relation to the public right of fishing: *Att.-Gen. for British Columbia v. Att.-Gen. for Canada*. (5) There is no proprietary interest in the air over a Province: Oppenheim's *International Law*, vol. 1, p. 498. It is not contended that a Province may not have a Provincial air service subject to the observance of the Dominion regulations.

Oct. 22. The judgment of their Lordships was delivered by

LORD SANKEY L.C. This appeal raises an important question as between the Dominion and the Provinces of Canada regarding the right to control and regulate aeronautics, including the granting of certificates to persons to act as pilots, the inspection and licensing of aircraft, and the inspection and licensing of aerodromes and air-stations. The question is whether the subject is one on which the Dominion Parliament is alone competent to legislate, or whether it is in each Province so related to Provincial property and civil rights and local matters as to exclude the Dominion from any (or from more than a very limited) jurisdiction in respect of it.

The Supreme Court of Canada has decided the question in its several branches adversely to the claims of the Dominion, and has held in effect that while the Dominion has a considerable field of jurisdiction in the matter under

(1) [1896] A.C. 348, 364.

(2) 7 App. Cas. 829, 839.

(3) [1925] A.C. 396, 412.

(4) [1923] A.C. 695, 704.

(5) [1914] A.C. 153, 172-174.

various heads of s. 91 of the British North America Act, 1867, there is also a local field of jurisdiction for the Provinces, and that the Dominion jurisdiction does not extend so far as to permit it to deal with the subject in the broad way in which it has attempted to deal with it in the legislation under consideration.

During the sittings of the peace conference in Paris at the close of the European war, a convention relating to the regulation of aerial navigation, dated October 13, 1919, was drawn up by a Commission constituted by the Supreme Council of the peace conference. That convention was signed by the representatives of the allied and associated powers, including Canada, and was ratified by His Majesty on behalf of the British Empire on June 1, 1922. It is now in force between the British Empire and seventeen other States.

With a view to performing her obligations as part of the British Empire under this convention, which was then in course of preparation, the Parliament of Canada enacted the Air Board Act, c. 11 of the Statutes of Canada, 1919 (1st session), which with an amendment thereto, was consolidated in the Revised Statutes of Canada, 1927, as c. 43, under the title the Aeronautics Act. It is to be noted, however, that the Act does not by reason of its reproduction in the Revised Statutes take effect as a new law. The Governor General in Council, on December 31, 1919, pursuant to the Air Board Act, issued detailed "Air Regulations" which, with certain amendments, are now in force. By the National Defence Act, 1922, the Minister of National Defence thereafter exercised the duties and functions of the Air Board.

By these statutes and the Air Regulations, and the amendments thereto, provision is made for the regulation and control in a general and comprehensive way of aerial navigation in Canada, and over the territorial waters thereof. In particular, s. 4 of the Aeronautics Act purports to give the Minister of National Defence a general power to regulate and control, subject to approval by the Governor in Council (with statutory force and under the sanction of penalties on summary conviction), aerial navigation over Canada and her territorial waters, including power to regulate the licensing of pilots, aircraft, aerodromes and commercial services; the conditions under which aircraft may

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be used for goods, mails and passengers, or their carriage over any part of Canada; the prohibition (absolute or conditional) of flying over prescribed areas; aerial routes, and provision for safe and proper flying.

Their Lordships were told during the course of the argument that no Provincial Legislature had passed any such legislation, but that this had not prevented the progress of aeronautical development in the Provinces. It appears, for example, that in Ontario there has been established subject to these Regulations one of the most complete survey services in the Empire, and that it is working most harmoniously. Their Lordships are not aware that any practical difficulty has arisen in consequence of the general control of flying being in the hands of the Dominion, but at a conference at Ottawa between representatives of the Dominion Government and of the several Provincial Governments in November, 1927, a question was raised by the representatives of the Province of Quebec as to the legislative authority of the Parliament of Canada to sanction regulations for the control of aerial navigation generally within Canada—at all events in their application to flying operations carried on within a Province—and it was agreed that the question so raised was proper to be determined by the Supreme Court of Canada. Thereupon four questions were referred by His Excellency, the Governor General in Council, under an Order dated April 15, 1929, to the Supreme Court for hearing and consideration, pursuant to s. 55 of the Supreme Court Act, R.S. Can., 1927, c. 35, touching the respective powers under the British North America Act, 1867, of the Parliament and Government of Canada and of the Legislatures of the Provinces in relation to the regulation and control of aeronautics in Canada.

The determination of these questions depends upon the true construction of ss. 91, 92 and 132 of the British North America Act. Sect. 132 provides as follows: "The Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada or of any province thereof, as part of the British Empire, towards foreign countries, arising under treaties between the Empire and such foreign countries." It is not necessary to set out at length the familiar ss. 91 and 92 which deal with the distribution of legislative powers. Sect. 91

tabulates the subjects to be dealt with by the Dominion, and s. 92 the subjects to be dealt with exclusively by the Provincial legislatures, but it will not be forgotten that s. 91, in addition, authorizes the King by and with the advice and consent of the Senate and House of Commons of Canada to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the Provinces, and further provides that any matter coming within any of the classes of subjects enumerated in the section shall not be deemed to come within the classes of matters of a local and private nature comprised in the enumeration of classes of subjects assigned by s. 92 exclusively to the legislatures of the Provinces.

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The four questions addressed to the Court are as follows:—

“(1.) Have the Parliament and Government of Canada exclusive legislative and executive authority for performing the obligations of Canada, or of any Province thereof, under the convention entitled ‘Convention relating to the Regulation of Aerial Navigation?’

(2.) Is legislation of the Parliament of Canada providing for the regulation and control of aeronautics generally within Canada, including flying operations carried on entirely within the limits of a Province, necessary or proper for performing the obligations of Canada, or of any Province thereof, under the convention aforementioned within the meaning of s. 132 of the British North America Act, 1867?

(3.) Has the Parliament of Canada legislative authority to enact, in whole or in part, the provisions of s. 4 of the Aeronautics Act, c. 3, Revised Statutes of Canada, 1927?

(4.) Has the Parliament of Canada legislative authority to sanction the making and enforcement, in whole or in part, of the regulations contained in the Air Regulations, 1920, respecting: (a) The granting of certificates or licences authorizing persons to act as pilots, navigators, engineers or inspectors of aircraft and the suspension or revocation of such licences; (b) the regulation, identification, inspection, certification, and licensing of all aircraft; and (c) the licensing, inspection and regulation of all aerodromes and air stations?”

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We sympathize with the view expressed at length by Newcombe J., which was concurred in by the Chief Justice, as to the difficulty which the Court must experience in endeavouring to answer questions put to it in this way. It is true that the advisability of propounding for the consideration of the Court abstract questions or questions involving considerations of debatable fact is, to say the least, doubtful; and it is undesirable that the Court should be called upon to express opinions which may affect the rights of persons not represented before it or touching matters of such a nature that its answers must be wholly ineffectual with regard to parties who are not and who cannot be brought before it—for example, foreign governments. Their Lordships agree, however, with both these learned judges that the position must be accepted as expounded by Lord Haldane in *Attorney-General for British Columbia v. Attorney-General for Canada* (1), where he says: “The business of the Supreme Court of Canada is to do what is laid down as its duty by the Dominion Parliament, and the duty of the Judicial Committee, although not bound by any Canadian statute, is to give to it as a Court of review such assistance as is within its power. Nevertheless, under this procedure questions may be put of a kind which it is impossible to answer satisfactorily. Not only may the question of future litigants be prejudiced by the Court laying down principles in an abstract form without any reference or relation to actual facts, but it may turn out to be practically impossible to define a principle adequately and safely without previous ascertainment of the exact facts to which it is to be applied. It has therefore happened that in cases of the present class their Lordships have occasionally found themselves unable to answer all the questions put to them, and have found it advisable to limit and guard their replies.”

The difficulty in the present case is accentuated by the comprehensive nature of the questions. For example, question 1 refers to the obligations of Canada under the Convention. That Convention contains forty-three articles and sixteen annexes, many of which contain a large number of sections dealing with hundreds of details relating to the marking of aircraft, certificates of airworthiness,

(1) [1914] A.C. 153, 162.

lights, signals and rules of air traffic, visibility, maps, warnings and so forth. It would be extremely difficult for this Board to deal with every one of these many hundreds of topics in detail. So too, with regard to question 3, which asks whether the Parliament of Canada has legislative authority to enact in whole or in part the provisions of s. 4 of the Aeronautics Act. That section refers to a great number of topics, numbering nearly a hundred in all; take, for example (f), the prohibition of navigation of aircraft over such areas as may be prescribed, either at all times or at such times or on such occasions only as may be specified in the regulation, and either absolutely or subject to such exceptions or conditions as may be so specified. To deal with each one of these numerous alternatives would be impossible. The Board certainly has no desire, nor do they conceive it to be part of their function to act as draftsmen for Canadian Acts of Parliament. The Canadian parliamentary draftsmen are far more familiar with Canadian legislation than this Board is, and their Lordships cannot conceive it to be the wish of anybody that Acts of Parliament passed by the Senate and Commons of Canada should be referred wholesale to this Board in order to determine without reference to particular facts whether or not it was competent for Parliament to pass upon the hundred and one matters for which they have legislated.

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The Supreme Court felt, as their Lordships feel, the difficulty first of appreciating the questions and then of answering them. This is shown by the form of the answers as returned on the judgment now under review. To question 1 as framed (note the words "as framed"), the Court unanimously answered "No." The Chief Justice in his judgment says: "I agree with the view of my brother Smith that if the question is to be answered in the affirmative the word 'paramount' must be substituted for 'exclusive.' It might also be better to insert the words 'as part of the British Empire towards foreign countries' immediately after the word 'thereof,' so as definitely to limit the question and answer to the very matter dealt with by s. 132." To question 2 the answer of the majority of the Court was: "Construing the word 'generally' in the question as equivalent to 'in every respect' the answer is 'No.'" To question 3 the answer of the majority of the Court was: "Construing the question as meaning 'is the section mentioned, as it

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stands, validly enacted?' the answer is 'No,' but if the question requires the Court to consider the matters in the enumerated sub-heads of s. 4 of the statute as severable fields of legislative jurisdiction, then the answers are to be ascertained from the individual opinions or reasons certified by the judges." To question 4 the answers are to be ascertained from the individual opinions or reasons certified by the judges. Duff J., in his opinion, which was concurred in by Rinfret and Lamont JJ., went into the matter with very great particularity, as will appear by the following quotation. Referring to question 4, sub-head (b), he says: "Regulations 3, 4, 124 (2.), and 10 would be invalid. Regulations 5 and 6 would be valid. Regulations 7, 8, 9, 11, 15, 16 and 17 are subsidiary regulations, which would be valid if associated with a valid principal regulation. Sub-sections 1 and 3 of regulation 12 would be valid, and sub-s. 2 of that regulation invalid."

The soundness of these answers is challenged in the present appeal except in the case of the answer to the second question which the Board was expressly informed was not submitted for review. In the case for the appellant the Attorney-General of Canada says that he "does not consider it to be desirable or necessary to press for a review on the present appeal of the answer given by the Supreme Court of Canada to question 2. The argument on behalf of the Attorney-General for Canada on the present appeal and the terms of this case will accordingly be confined to questions 1, 3 and 4." Their Lordships were, however, informed by the learned counsel who conducted the appeal on behalf of the Dominion that "when the Dominion decided to omit a discussion with regard to question 2 from its factum and from its case before this Board, it was not because it was adopting the answer and saying 'this is accepted, and on the assumption that this view as to question 2 is right, tell us the answers to the others only.' It was merely that the question had provoked a great deal of discussion in the Supreme Court at Ottawa as to what its precise meaning was and what was the effect of the word 'generally' as used in it, whether it meant 'in every respect' or whether it meant 'speaking broadly' . . . it was thought that might be avoided here by submitting questions 1, 3 and 4, to your Lordships, because answers to those would, in the view of the Dominion, solve the questions

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and really be a sufficient answer to question 2," and he added, "there is one element only that need be referred to—namely military aircraft. They are not under the Convention at all and the Act deals with military aircraft. Therefore, it could not possibly be said that the Convention was a justification for the whole Air Board Act and the Regulations which go with it in respect of military aircraft, and therefore the answer technically would be 'No.'"

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This being the position when the matter was argued before the Board, their Lordships think that the clearest way in which to express their opinion would be to answer the questions immediately and then to give their reasons for these answers; but before doing so, it is necessary to point out that their Lordships are not concerned with any theoretical matters. They conceive themselves to be asked specific questions about specific legislation.

To question 1, and retaining the word "exclusive," the Board's answer is "Yes."

To question 3, their answer is also "Yes."

To question 4, their answer is again "Yes."

Before discussing the several questions individually, it is desirable to make some general observations upon ss. 91 and 92, and 132.

With regard to ss. 91 and 92, the cases which have been decided on the provisions of these sections are legion. Many inquests have been held upon them, and many great lawyers have from time to time dissected them.

Under our system decided cases effectively construe the words of an Act of Parliament and establish principles and rules whereby its scope and effect may be interpreted. But there is always a danger that in the course of this process the terms of the statute may come to be unduly extended and attention may be diverted from what has been enacted to what has been judicially said about the enactment.

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To borrow an analogy; there may be a range of sixty colours, each of which is so little different from its neighbour that it is difficult to make any distinction between the two, and yet at the one end of the range the colour may be white and at the other end of the range black.

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Great care must therefore be taken to consider each decision in the light of the circumstances of the case in view of which it was pronounced, especially in the interpretation of an Act such as the British North America Act, which was a great constitutional charter, and not to allow general phrases to obscure the underlying object of the Act, which was to establish a system of government upon essentially federal principles. Useful as decided cases are, it is always advisable to get back to the words of the Act itself and to remember the object with which it was passed.

Inasmuch as the Act embodies a compromise under which the original Provinces agreed to federate, it is important to keep in mind that the preservation of the rights of minorities was a condition on which such minorities entered into the federation, and the foundation upon which the whole structure was subsequently erected. The process of interpretation as the years go on ought not to be allowed to dim or to whittle down the provisions of the original contract upon which the federation was founded, nor is it legitimate that any judicial construction of the provisions of ss. 91 and 92 should impose a new and different contract upon the federating bodies.

But while the Courts should be jealous in upholding the charter of the Provinces as enacted in s. 92 it must no less be borne in mind that the real object of the Act was to give the central Government those high functions and almost sovereign powers by which uniformity of legislation might be secured on all questions which were of common concern to all the Provinces as members of a constituent whole.

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While the decisions which the Board has pronounced in the many constitutional cases which have come under their consideration from the Dominion must each be regarded in the light of the facts involved in it, their Lordships recognize that there has grown up around the British North America Act a body of precedents of high authority and value as guides to its interpretation and application. The useful and essential task of taking stock of this body of authority and reviewing it in relation to the original text has been undertaken by this Board from time to time and notably, for example, in *Attorney-General for Ontario*

v. *Attorney-General for Canada* (1); *Attorney-General for Canada v. Attorney-General of Ontario* (2); *City of Montreal v. Montreal Street Ry.* (3); and in the same year *Attorney-General for Ontario v. Attorney-General for Canada*.

(4) In all these four cases the scope of the two sections was carefully considered, but it is not necessary to cite them at length because so recently as last year this Board reviewed them in the case of *Attorney-General for Canada v. Attorney-General for British Columbia* (5), and laid down four propositions relative to the legislative competence of Canada and the Provinces respectively as established by the decisions of the Judicial Committee. These propositions are as follows:—

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1. The legislation of the Parliament of the Dominion, so long as it strictly relates to subjects of legislation expressly enumerated in s. 91, is of paramount authority, even though it trenches upon matters assigned to the Provincial legislatures by s. 92.

2. The general power of legislation conferred upon the Parliament of the Dominion by s. 91 of the Act in supplement of the power to legislate upon the subjects expressly enumerated must be strictly confined to such matters as are unquestionably of national interest and importance, and must not trench on any of the subjects enumerated in s. 92, as within the scope of Provincial legislation, unless these matters have attained such dimensions as to affect the body politic of the Dominion.

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3. It is within the competence of the Dominion Parliament to provide for matters which, though otherwise within the legislative competence of the Provincial legislature, are necessarily incidental to effective legislation by the Parliament of the Dominion upon a subject of legislation expressly enumerated in s. 91.

4. There can be a domain in which Provincial and Dominion legislation may overlap, in which case neither legislation will be ultra vires if the field is clear, but if the field is not clear and the two legislations meet the Dominion legislation must prevail.

(1) [1896] A.C. 348.

(3) [1912] A.C. 333.

(2) [1898] A.C. 700.

(4) [1912] A.C. 571.

(5) [1930] A.C. 111 118.

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Their Lordships particularly emphasize the second and third of these categories, and refer to the remarks made by Lord Watson in *Attorney-General for Ontario v. Attorney-General for Canada* (1), where he says: "Their Lordships do not doubt that some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion. But great caution must be observed in distinguishing between that which is local and provincial, and therefore within the jurisdiction of the provincial legislatures, and that which has ceased to be merely local or provincial, and has become matter of national concern in such sense as to bring it within the jurisdiction of the Parliament of Canada." Further, their Lordships desire to refer to *Fort Frances Pulp and Power Co. v. Manitoba Free Press Co.* (2), where it was held that the Canadian War Measures Act, 1914, and certain Orders in Council made thereunder during the War were intra vires of the Dominion. Lord Haldane there said: "The general control of property and civil rights for normal purposes remains with the Provincial Legislatures. But questions may arise by reason of the special circumstances of the national emergency which concern nothing short of the peace, order and good government of Canada as a whole." These remarks must again be taken subject to the situation then prevailing, for he adds later: "It may be that it has become clear that the crisis which arose is wholly at an end and that there is no justification for the continued exercise of an exceptional interference which becomes ultra vires when it is no longer called for. In such a case the law as laid down for the distribution of powers in the ruling instrument would have to be invoked."

It is obvious, therefore, that there may be cases of emergency where the Dominion is empowered to act for the whole. There may also be cases where the Dominion is entitled to speak for the whole, and this not because of any judicial interpretation of ss. 91 and 92, but by reason of the plain terms of s. 132, where Canada as a whole, having undertaken an obligation, is given the power necessary and proper for performing that obligation.

(1) [1896] A.C. 348, 361.

(2) [1923] A.C. 695, 704, 706.

During the course of the argument, learned counsel on either side endeavoured respectively to bring the subject of aeronautics within s. 91 or s. 92. Thus, the appellant referred to s. 91, item 2 (the regulation of trade and commerce); item 5 (postal services); item 9 (beacons); item 10 (navigation and shipping). Their Lordships do not think that aeronautics can be brought within the subject navigation and shipping, although undoubtedly to a large extent, and in some respects, it might be brought under the regulation of trade and commerce, or the postal services. On the other hand, the respondents contended that aeronautics as a class of subject came within item 13 of s. 92 (property and civil rights in the Provinces) or item 16 (generally all matters of a merely local and private nature in the Provinces). Their Lordships do not think that aeronautics is a class of subject within property and civil rights in the Provinces, although here again, ingenious arguments may show that some small part of it might be so included.

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In their Lordships' view, transport as a subject is dealt with in certain branches both of s. 91 and of s. 92, but neither of those sections deals specially with that branch of transport which is concerned with aeronautics.

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Their Lordships are of opinion that it is proper to take a broader view of the matter rather than to rely on forced analogies or piecemeal analysis. They consider the governing section to be s. 132, which gives to the Parliament and Government of Canada all powers necessary or proper for performing the obligations towards foreign countries arising under treaties between the Empire and such foreign countries. As far as s. 132 is concerned, their Lordships are not aware of any decided case which is of assistance on the present occasion. It will be observed, however, from the very definite words of the section, that it is the Parliament and Government of Canada who are to have all powers necessary or proper for performing the obligations of Canada, or any Province thereof. It would therefore appear to follow that any Convention of the character under discussion necessitates Dominion legislation in order that it may be carried out. It is only necessary to look at the Convention itself to see what wide powers are necessary for performing the obligations arising thereunder. By article 1 the high contracting parties recognize that every Power (which includes Canada) has complete and

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exclusive sovereignty over the air space above its territory; by article 40, the British Dominions and India are deemed to be States for the purpose of the Convention.

The following appear to be among the principal obligations undertaken by Canada as part of the British Empire under the stipulations of the Convention:—

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1. The obligation not to permit (except by special and temporary authorization or under a special convention) the flight above its territory of an aircraft which does not possess the nationality of a contracting State, and indirectly, registration being the only means by which nationality is acquired, the obligation to require registration of any aircraft owned by a Canadian national and intended to be flown. (Arts. 5, 6 and 7.)
2. The obligation to see that no discrimination is made between its private aircraft (see Art. 30) and those of the other contracting States in regard to prohibition of flying over certain areas of its territory and that the locality and extent of the prohibited areas are published and notified beforehand to the other contracting States. (Art. 3.)
3. The obligation to require all aircraft engaged in international navigation to bear their nationality and registration marks as well as the name and residence of the owner, in accordance with annex A. (Art. 10.)
4. The obligation to require every aircraft engaged in international navigation to be provided, in accordance with the conditions laid down in annex B, with a certificate of airworthiness issued or rendered valid by the State whose nationality it possesses, i.e., in the case of Canadian aircraft by the Dominion. (Art. 11.)
5. The obligation to require the commanding officer, pilots, engineers and other members of the operating crew of every aircraft to be provided, in accordance with the conditions laid down in annex E, with certificates of competency and licences issued by the State whose nationality the aircraft possesses, i.e., in the case of Canadian aircraft by the Dominion. (Art. 12.)

6. The obligation to see that no wireless apparatus is carried on any aircraft without a special licence issued by the State whose nationality the aircraft possesses, i.e., in the case of Canadian aircraft without a special licence issued by the Dominion, and that no such apparatus is operated except by members of the crew provided with a special licence for the purpose; also to require every aircraft used in public transport and capable of carrying ten or more persons to be equipped with sending and receiving wireless apparatus. (Art. 14.)
7. The obligation to exempt foreign aircraft within Canada from any seizure on the ground of infringement of patent, design or model, subject to the deposit of security. (Art. 18.)
8. The obligation to require every aircraft engaged in international navigation to be provided with the documents specified in Art. 19.
9. The obligation to afford aircraft of contracting States, within Canada, the same measures of assistance for landing, particularly in case of distress, as national aircraft. (Art. 22.)
10. The obligation to require every aerodrome within Canada, which is open to public use by national aircraft, to extend the same facilities to aircraft of all the other contracting States under the same tariff of charges. (Art. 24.)
11. The obligation to require every aircraft flying within Canada and every national aircraft, wherever it may be, to comply with the regulations contained in annex D, relative to the rules as to lights and signals and air traffic.
12. The obligation to prohibit the carriage by aircraft, in international navigation, of explosives and of arms and munitions of war, and to prohibit foreign aircraft from carrying such articles between any two points within Canada.

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Canada also undertakes to observe the regulations contained in a great number of annexes. Annex A deals in many sections with the marking of aircraft; annex B with

J.C. certificates of airworthiness; annex C with log books;
 1931 annex D with lights, signals and rules for air traffic; annex
 {
 THE E with minimum qualifications necessary for obtaining cer-
 REGULATION tificates as pilots; annex F with maps and ground mark-
 AND ings; annex G has eight parts dealing with meteorological
 CONTROL OF information, visibility, messages, radio-telephony, synoptic
 AERO- charts, skeleton maps, information on aerodromes, warn-
 NAUTICS ings, ground signals; and annex H with customs.
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It is therefore obvious that the Dominion Parliament, in order duly and fully to "perform the obligations of Canada or of any Province thereof" under the Convention, must make provision for a great variety of subjects. Indeed, the terms of the Convention include almost every conceivable matter relating to aerial navigation, and we think that the Dominion Parliament not only has the right, but also the obligation, to provide by statute and by regulation that the terms of the Convention shall be duly carried out. With regard to some of them, no doubt, it would appear to be clear that the Dominion has power to legislate, for example, under s. 91, item 2, for the regulation of trade and commerce, and under item 5 for the postal services, but it is not necessary for the Dominion to piece together its powers under s. 91 in an endeavour to render them co-extensive with its duty under the Convention when s. 132 confers upon it full power to do all that is legislatively necessary for the purpose.

To sum up, having regard (a) to the terms of s. 132; (b) to the terms of the Convention which covers almost every conceivable matter relating to aerial navigation; and (c) to the fact that further legislative powers in relation to aerial navigation reside in the Parliament of Canada by virtue of s. 91, items 2, 5 and 7, it would appear that substantially the whole field of legislation in regard to aerial navigation belongs to the Dominion. There may be a small portion of the field which is not by virtue of specific words in the British North America Act vested in the Dominion; but neither is it vested by specific words in the Provinces. As to that small portion it appears to the Board that it must necessarily belong to the Dominion under its power to make laws for the peace, order and good government of Canada. Further, their Lordships are influenced by the facts that the subject of aerial navigation and the fulfilment of Canadian obligations under s. 132

are matters of national interest and importance; and that aerial navigation is a class of subject which has attained such dimensions as to affect the body politic of the Dominion.

For these reasons their Lordships have come to the conclusion that it was competent for the Parliament of Canada to pass the Act and authorize the Regulations in question, and that questions 1, 3 and 4, which alone they are asked to answer, should be answered in the affirmative.

Their Lordships will accordingly humbly advise His Majesty that this appeal should be allowed.

Solicitors for appellant: *Charles Russell & Co.*

Solicitors for respondents: *Blake & Redden.*

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AND CONTROL
OF AERO-
NAUTICS
IN CANADA,
In re.
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[PRIVY COUNCIL.]

CORPORATION OF THE CITY OF }
TORONTO.....}

APPELLANTS;

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AND

THE KING.....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ONTARIO,
APPELLATE DIVISION.*Canada (Ontario)—Legislative power—"Royalties"—Fines for criminal offences—Dominion Act diverting fines from Provincial Treasury—Criminal law—Criminal Code of Canada, s. 1036, sub-s. 1—British North America Act, 1867 (30 & 31 Vict. c. 3), s. 91, head 27; s. 109.*

Assuming, without deciding, that the term "royalties" in s. 109 of the British North America Act, 1867, includes fines imposed for infractions of the criminal law, any right conferred by s. 109 on the Province of Ontario to claim fines as "royalties" extends only to such fines as have not been otherwise appropriated by competent authority, and the Parliament of Canada, having by s. 91, head 27, exclusive authority as to the criminal law, is competent to direct that fines shall be otherwise appropriated, and in what manner. That Parliament therefore had power to enact the proviso to s. 1036, sub-s. 1, of the Criminal Code of Canada directing that in the Province of Ontario fines are to be paid over to a municipal or local authority bearing, in whole or in part, the expense of administering the law under which the fine was imposed.

Bradlaugh v. Clarke (1883) 8 App. Cas. 354, 358, 368 applied.

Judgment of the Appellate Division, 65 Ont. L.R. 320, reversed.

APPEAL (No. 54 of 1931) from a judgment of the Supreme Court of Ontario (Appellate Division) delivered on March 28, 1930, reversing a judgment of Rose J.

The appellant City by a petition of right claimed that under the proviso to s. 1036, sub-s. 1, of the Criminal Code of Canada, the City and not the Crown in the right of the Province should have paid over to it a fine of \$60,000, which had been imposed upon certain persons convicted at the Toronto assizes of conspiring to defraud the Government of the Province. The Attorney-General for the Province by a statement of defence pleaded that the proviso above referred to was ultra vires, and that the fine became the property of His Majesty in the right of the Province under s. 109 of the British North America Act, 1867.

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**Present*:—VISCOUNT DUNEDIN, LORD BLANESBURGH, LORD ATKIN, LORD RUSSELL OF KILLOWEN, and LORD MACMILLAN.

The material facts, and the statutory provisions above mentioned, appear from the judgment of the Judicial Committee.

The trial judge, Rose J., dismissed the petition upon the grounds pleaded.

An appeal to the Appellate Division was allowed by a majority (Riddell, Masten, and Fisher J.J.A.; Latchford C.J. and Orde J.A. dissenting). The grounds of the judgments appear from a report at 65 Ont. L.R. 320.

1931. July 23, 24. *Geary K.C.* and *Hon. Geoffrey Lawrence K.C.* for the appellant City. By s. 109 of the British North America Act, 1867, "royalties" which then belonged to the former Provinces were vested in the Provinces then created. Having regard to the judgment of the Board in *Rex v. Att.-Gen. of British Columbia* (1) it is conceded that "royalties" may so vest although they arise after the Act. Even if fines came within the expression "royalties" as part of the jura regalia, that is only the case so far as they have not been otherwise appropriated by law: *Bradlaugh v. Clarke*. (2) The exclusive power of the Parliament of Canada under s. 91, head 27, extends to the criminal law in its widest sense: *Att.-Gen. for Ontario v. Hamilton Street Ry. Co.* (3) Under that head the Dominion legislature had power to direct to whom fines should be paid, and consequently to enact the proviso to s. 1036, sub-s. 1, of the Criminal Code. The power applied not only to fines arising under provisions of the Criminal Code enacted by the Dominion, but also to fines under common law offences. The power was not affected by the Provincial powers under s. 92: *Att.-Gen. of British Columbia v. Att.-Gen. of Canada* (4); *Att.-Gen. for Alberta v. Att.-Gen. for Canada*. (5)

Tilley K.C. and *E. Bayly K.C.* (with them *A. T. Denning*) for the Attorney-General for Ontario. Before the Act of 1867 fines of the nature now in question were paid to the old Provinces under the Statutes of United Canada, 1859, c. 118. They represented part of the prerogative revenue of the Crown and were within the word "royalties":

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(1) [1924] A.C. 213.

(2) 8 App. Cas. 354.

(3) [1903] A.C. 524.

(4) [1924] A.C. 222.

(5) [1928] A.C. 475, 486.

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Blackstone, Bk. 1, ch. 8 (passim), *Amerciaments and Fines* (1); *Bradlaugh v. Clarke*. (2) By s. 109 they were vested in and appropriated to the respective new Provinces and became part of their property and assets. Although s. 1036, sub-s. 1(a) and (b) may be valid, the proviso was invalid. It was not in substance an enactment as to the criminal law within s. 91, head 27. Further, the Dominion powers under s. 91 do not enable it to affect property assigned to the Provinces: *Att.-Gen. for Canada v. Att.-Gen. for Ontario* (3); *City of Montreal v. Montreal Harbour Commissioners* (4); *Reference re Waters and Water-courses*. (5) The proviso dealt with a matter which was local, and affected one Province only; further, it interfered with municipal institutions in the Province (s. 92, head 8), and the administration of justice in the Province (s. 92, head 14). The cost incurred in the Province in enforcing the law is dealt with by Provincial enactments. Under s. 12 of the Act of 1867 the Governor General in Council may remit a fine, but that is the only power under the Act to deal with a fine once it is imposed.

Plaxton K.C. for the Attorney-General for Canada, intervenor.

Lancot K.C. and *Maurice Alexander* for the Attorney-General for Quebec, intervenor.

Oct. 22. The judgment of their Lordships was delivered by

1932 A.C.
p. 101. LORD MACMILLAN. On October 24, 1924, at a sitting of the High Court Division of the Supreme Court of Ontario held at the city of Toronto, one Aemilius Jarvis, after trial before the Chief Justice of the Common Pleas and a jury, was found guilty of conspiring to defraud the Government of the Province of Ontario and was sentenced to be imprisoned for six months and to pay a fine (as reduced on appeal) of \$60,000. The fine was paid to the senior registrar of the Supreme Court of Ontario on April 22, 1925. Thereupon, the present appellant, the Corporation of Toronto, founding on the proviso to s. 1036, sub-s. 1, of the Criminal Code of Canada, claimed that the fine

(1) (1704) 3 Salk. 32.

(2) 8 App. Cas. 354.

(3) [1898] A.C. 700.

(4) [1926] A.C. 299.

(5) [1929] S.C.R. 200.

should be paid over to it. That section enacts that "when-
ever no other provision is made by any law of Canada for
the application of any fine imposed for the
violation of any law the same shall be paid
over by the magistrate or officer receiving the same to the
treasurer of the province in which the same is imposed,"
with certain specified exceptions, after which follows this
proviso: "Provided, however, that with respect to the
Province of Ontario the fines first mentioned
in this section, shall be paid over to the municipal or local
authority, where the municipal or local authority wholly
or in part bears the expense of administering the law under
which the same was imposed."

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It was admitted that the expense of administering the
law under which the fine of \$60,000 in question was im-
posed was in part borne by the appellant corporation.

The senior registrar did not give effect to the claim of
the appellant and paid over the fine to the Attorney-
General for the Province of Ontario. The latter in turn
forwarded it to the Provincial treasurer, who retained it
as part of the funds of the Province.

The appellant corporation then presented a petition of
right in the Supreme Court of Ontario claiming (1.) a
declaration that it was entitled to payment of the fine,
and (2.) an order for payment thereof. In the statement
of defence lodged, on behalf of the respondent, the Attor-
ney-General for the Province submitted (1.) that the pro-
viso above quoted to s. 1036 of the Criminal Code of
Canada was ultra vires of the Parliament of Canada, and
(2.) that the fine in question when paid to the registrar
became the property of His Majesty in right of the Prov-
ince of Ontario under s. 109 of the British North America
Act. That section is in the following terms: "All lands,
mines, minerals and royalties belonging to the several
Provinces of Canada, Nova Scotia and New Brunswick at
the Union, and all sums then due or payable for such lands,
mines, minerals or royalties shall belong to the several
Provinces of Ontario, Quebec, Nova Scotia and New Bruns-
wick, in which the same are situate or arise, subject to any
trusts existing in respect thereof and to any interest other
than that of the Province in the same."

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The trial judge (Rose J.) found the appellant corporation entitled to the relief sought, but on appeal, the Appellate Division, by a majority of three to two (Riddell, Masten and Fisher J.J.A.; Latchford C.J. and Orde J.A. dissenting) reversed the decision of the trial judge. Hence the present appeal. The Attorney-General of Canada was granted special leave to intervene and has lodged a case in which he maintains the legislative authority of the Parliament of Canada to enact the provisions of s. 1036 of the Criminal Code of Canada and in particular the proviso now challenged. The Attorney-General for Quebec intervenes in support of the contentions for the Province of Ontario.

The controversy which has thus in the aggregate equally divided judicial opinion in Ontario, presents a clear-cut issue. On the one hand the appellant corporation, supported by the Attorney-General for the Dominion, maintains that the legislation impugned was within the competence of the Dominion Parliament under s. 91 of the British North America Act whereby the exclusive legislative authority of the Parliament of Canada is declared to extend to: "27. The criminal law except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters." On the other hand it is maintained on behalf of the Province that fines imposed for offences against the criminal law are "royalties" within the meaning of s. 109 of the British North America Act above quoted, that the right to all such fines belonged to the Province of Canada at the Union and consequently that all such fines arising in the Province of Ontario have since the Union belonged and now belong to the Province; it was therefore ultra vires of the Dominion Parliament to enact legislation depriving the Province of a right which the British North America Act conferred upon it, and the Provincial legislature alone was entitled to legislate as to the destination of fines imposed in the Province, for such fines come under head 13 of s. 92 of the Act as "property and civil rights in the Province."

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The term "royalties" as used in s. 109 of the British North America Act, 1867, has more than once been the

subject of interpretation by this Board. In *Attorney-General of Ontario v. Mercer* (1), it was held to include escheats; and in *Rex v. Attorney-General of British Columbia* (2) it was held to include bona vacantia. As was pointed out in the latter case (3), their Lordships have refrained from attempting any comprehensive definition of the content of the term, preferring to deal with each case as it arises. They are now called upon to consider the case of fines inflicted for breaches of the criminal law.

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That the Sovereign has a prerogative right to receive fines imposed on convicted persons may be accepted as a general principle, but it is not an absolute or unqualified right. Historically it is no doubt associated with the conception of the administration of justice by the King as at once a duty and privilege and a valuable source of profit. "The Crown, and the Crown alone, is charged generally with the execution and enforcement of penal laws enacted by public statute for the public good and is interested jure publico in all penalties imposed by such statutes; and therefore may sue for them in due course of law, where no provision is made to the contrary": per Selborne L.C. in *Bradlaugh v. Clarke*. (4) The law is "that every unappropriated penalty goes to the King." (5) While the right to receive fines imposed for criminal offences may thus with sufficient accuracy be described as a jus regale or royalty, it is a right of a special kind. The legal characteristics of the jura regalia vary. Some are incommunicable to a subject; others may be granted to or acquired by subjects. Some are absolute; others are qualified. In the case of fines, it is only those which are "unappropriated" which belong to the Crown, i.e., those the disposition of which has not been by competent authority otherwise directed. The criminal law provides many instances in which fines imposed for particular crimes or offences are directed to be paid over to named persons or institutions, for example, to a common informer. The motive may be either the encouragement of the detection and prosecution of crime or the recognition of the special claim of a particular institution or object to the benefit of this source of revenue. In so far as the legislature directs the special application of

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(1) (1883) 8 App. Cas. 767.

(2) [1924] A.C. 213.

(3) [1924] A.C. 221.

(4) 8 App. Cas. 354, 358.

(5) 8 App. Cas. 368.

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fines the prerogative right to fines is abrogated. It is only where, as Lord Selborne says in the passage above quoted, "no provision is made to the contrary" that fines belong de jure to the Crown.

Turning now to s. 91 of the British North America Act, their Lordships find that "notwithstanding anything in this Act," and therefore notwithstanding the provisions of s. 109, "the exclusive legislative authority of the Parliament of Canada extends to all matters coming within . . . the criminal law." Plainly, and indeed admittedly, this confers on the Dominion Parliament the exclusive right by legislation to create and define crimes and to impose penalties for their commission. In their Lordships' opinion it no less empowers the Dominion legislature to direct how penalties for infraction of the criminal law shall be applied. It has always been regarded as within the scope of criminal legislation to make provision for the disposal of penalties inflicted, as innumerable instances show, and the power to do so is, if not essential, at least incidental, to the power to legislate on criminal matters for it may well go to the efficacy of such legislation. If the power to direct the manner of application of penalties were to be dissociated from the power to create such penalties and were to be lodged in another authority, it is easy to see how penal legislation might be seriously affected, if not stultified.

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Assuming then, though without deciding, that the term "royalties" as used in s. 109 of the British North America Act, 1867, is apt to include fines imposed for infraction of the criminal law, their Lordships reach the conclusion that any right conferred by that section on the province of Ontario to claim fines as "royalties" extends only to such fines as have not been otherwise appropriated by competent authority and that the Dominion Parliament is an authority competent to direct that, and how, such fines may be otherwise appropriated.

Holding this view their Lordships find it unnecessary to enter at any length upon the question whether the particular crime of which Jarvis was convicted and for which he was fined was or was not a recognized crime at the union, or whether it was a common law crime or a statutory crime. They note that the indictment on which he was charged embraced seven heads of which four appear

to be common law charges and three to be charges of contravening the Criminal Code. The charge upon which he was actually convicted and fined appears to have been the charge of conspiracy to defraud, which is expressly created and defined by s. 444 of the Criminal Code, while the fine imposed was authorized by the combined effect of that section and s. 1035, sub-s. 2. The particular case in hand would therefore seem to be one in which the fine was imposed under the Criminal Code for a crime committed against that Code, and as to which therefore there might well be room for argument that the right to such a fine did not belong to the Province of Canada at the union. Their Lordships, however, do not proceed upon this ground, but on the general principle that any prerogative right to fines which as a "royalty" passed from the Province of Canada to the Province of Ontario at the union was a right only to such fines as might not be otherwise appropriated by the Dominion Parliament in the exercise of its exclusive right to legislate on all matters coming within the criminal law. They therefore hold that the impugned proviso to s. 1036, sub-s. 1, of the Criminal Code of Canada was not ultra vires of the Parliament of Canada.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, the judgment of the Appellate Division reversed and the judgment of the trial judge restored. The appellate Corporation will have its costs here and below.

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Solicitors for appellants: *Freshfields, Leese & Munns.*

Solicitors for respondent: *Blake & Redden.*

Solicitors for intervener: *Charles Russell & Co.*

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